Supreme Court, U.S.
FILED
00 623 OCT 19 2000
OFFICE OF THE CLERK

No. ——

IN THE
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7945

ROBERT D. JOFFE
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

October 19, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

87pp

QUESTIONS PRESENTED

The United States Court of Appeals for the District of Columbia Circuit held in this case that 47 U.S.C. § 533(f)(1)(A), which limits the number of subscribers to whom operators of cable-television systems may speak, and 47 U.S.C. § 533(f)(1)(B), which limits the amount of their own speech cable operators may provide over their cable systems, do not abridge free speech in violation of the First Amendment.

The questions presented are:

1. Whether strict scrutiny is triggered when Congress imposes direct limits on the quantity of a cable operator's expression in an attempt to enhance the overall diversity of speech content within the cable medium.

2. Whether a law restricting speech as a "structural" "prophylaxis" is invalid under intermediate scrutiny when it is justified only by speculation undermined rather than supported by the record evidence.

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner states that all parties to the proceedings in the court of appeals are listed in the caption of the case.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states the following. Time Warner Entertainment Company, L.P., is a Delaware limited partnership. The general partners in Time Warner Entertainment Company, L.P., each are directly or indirectly wholly owned by Time Warner Inc., a publicly traded Delaware corporation. An ownership interest of more than 10 percent in Time Warner Entertainment Company, L.P., is held (directly or indirectly) by AT&T Corp., a publicly held company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	3
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE PETITION	9
I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT, IN CABLE AS WELL AS IN OTHER MEDIA, DIRECT LIMITS ON THE QUANTITY OF SPEECH AIMED AT ENHANCING THE DIVERSITY OF CONTENT TRIGGER STRICT SCRUTINY	10
A. Direct Limits on Speech Quantity Trigger Strict Scrutiny Even if They Are Content-Neutral	10
B. Speech Suppression in the Name of Content Diversity Triggers Strict Scrutiny	13
C. This Court Should Grant Review To Hold That There Is No "Cable Exception" to the First Amendment	16

TABLE OF CONTENTS—Continued

Page

II. THIS COURT SHOULD GRANT REVIEW TO REAFFIRM THAT AVOWEDLY PROPHYLACTIC SPEECH-RESTRICTING PROVISIONS CANNOT SATISFY INTERMEDIATE SCRUTINY BASED ON MERE SPECULATION 22

A. This Court Should Grant Review To Establish That Intermediate Scrutiny Cannot Be Satisfied by Supposed "Common Sense" in the Face of Contrary Record Evidence 22

B. This Court Should Grant Review To Establish That Prophylactic Speech-Restricting Measures Are Invalid Under Intermediate Scrutiny 26

CONCLUSION 30

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Page

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) 12

American Radio Ass'n v. Mobile Steamship Ass'n, 419 U.S. 215 (1974) 12

Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994) 29

Bailey v. Morales, 190 F.3d 320 (5th Cir. 1999) ... 26

Baker v. Carr, 369 U.S. 186 (1962) 22

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 12

BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994) 29

Buckley v. Valeo, 424 U.S. 1 (1976) 11, 15

Butterworth v. Smith, 494 U.S. 624 (1990) 11

Cable Alabama Corp. v. City of Huntsville, 768 F. Supp. 1484 (N.D. Ala. 1991) 28

Cameron v. Johnson, 390 U.S. 611 (1968) 12

Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. 1465 (N.D. Cal. 1986) 28

Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924) 22

Chesapeake & Potomac Tel. Co. of Virginia v. United States, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996) 29

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 27

City of Ladue v. Gilleo, 512 U.S. 43 (1994) 11

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 12

Cohen v. California, 403 U.S. 15 (1971) 12

TABLE OF AUTHORITIES—Continued

Page

Cox Cable Communications, Inc. v. United States, 774 F. Supp. 633 (M.D. Ga. 1991), *remanded*, 992 F.2d 1178 (11th Cir. 1993) 28
Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) 2, 20, 21
Edenfield v. Fane, 507 U.S. 761 (1993) 26, 27
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)..... 14, 15
44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)..... 25
GTE California, Inc. v. FCC, 39 F.3d 940 (9th Cir. 1994)..... 29
GTE South, Inc. v. United States, No. 94-1588-A (E.D. Va. Jan. 13, 1995), *remanded as moot*, No. 95-1738 (4th Cir. May 15, 1996) 29
Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173 (1999) 26, 27
Grosjean v. American Press Co., 297 U.S. 233 (1936)..... 11
Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954 (N.D. Cal. 1987)..... 28
Harman v. City of New York, 140 F.3d 111 (2d Cir. 1998)..... 26
Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995)..... 17, 19
Ibanez v. Florida Dep't of Business & Prof'l Reg., 512 U.S. 136 (1994)..... 26
Jones Intercable of San Diego, Inc. v. City of Lake Elsinore, No. SACV 90-636-GLT (C.D. Cal. Apr. 4, 1991) 28
Lovell v. City of Griffin, 303 U.S. 444 (1938)..... 13
Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 13

TABLE OF AUTHORITIES—Continued

Page

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 15
Meyer v. Grant, 486 U.S. 414 (1988) 11
Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) 21
NYNEX Corp. v. United States, Civ. No. 93-323-P-C, 1994 WL 779761 (D. Me. Dec. 8, 1994) ... 29
Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935) 22
Pacific Gas & Elec. Co. v. Public Utils. Comm'n of California, 475 U.S. 1 (1986) 15
Pacific Telesis Group v. United States, 48 F.3d 1106 (9th Cir. 1994), *vacated sub nom. United States v. U S WEST, Inc.*, 516 U.S. 1155 (1996), *on remand*, 84 F.3d 1153 (9th Cir. 1996) 29
Preferred Communications, Inc. v. City of Los Angeles, 13 F.3d 1327 (9th Cir.), *cert. denied*, 512 U.S. 1235 (1994) 28
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 21
Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) 22
Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988) 28
Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 25, 26, 27
Schneider v. New Jersey, 308 U.S. 147 (1939) 13, 28
Simon & Schuster, Inc. v. Members of New York Crime Victims Bd., 502 U.S. 105 (1991) 11
Southern New England Tel. Co. v. United States, 886 F. Supp. 211 (D. Conn. 1995) 29

TABLE OF AUTHORITIES—Continued

Page

Southwestern Bell Corp. v. United States, Civ. A. No. 3:94-CV-193-D, 1995 WL 444414 (N.D. Tex. Mar. 27, 1995), *remanded as moot*, No. 95-10478 (5th Cir. Apr. 30, 1996) 29

Time Warner Cable v. City of New York, 943 F. Supp. 1357 (S.D.N.Y. 1996), *aff'd*, 118 F.3d 917 (2d Cir. 1997) 15

Turner Broadcasting System, Inc. v. FCC:

819 F. Supp. 32 (D.D.C. 1993), *vacated*, 512 U.S. 622 (1994) 16, 17

512 U.S. 622 (1994) ..... *passim*

520 U.S. 180 (1997) ..... *passim*

U.S. West, Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (2000) 29

U S West, Inc. v. United States, 855 F. Supp. 1184 (W.D. Wash.), *aff'd*, 48 F.3d 1092 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1996) 29

United States v. Chesapeake & Potomac Tel. Co., 516 U.S. 415 (1996) 29

United States v. National Treasury Employees Union, 513 U.S. 454 (1995) 26

United States v. O'Brien, 391 U.S. 367 (1968) 12

United States v. Playboy Entertainment Group, Inc., 120 S. Ct. 1878 (2000) 2, 20

United States Tel. Ass'n v. United States, No. 1:94cv1961 (D.D.C. Feb. 14, 1995), *vacated and remanded as moot*, No. 95-5117, 1996 WL 587633 (D.C. Cir. Sept. 16, 1996) 29

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 28

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 12, 13

TABLE OF AUTHORITIES—Continued

Page

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 28

ADMINISTRATIVE DECISIONS

Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Sixth Annual Report, 15 FCC Rcd 978 (2000) 23

Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report, 5 FCC Rcd 4962 (1990) 23

Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits, Third Report and Order, 14 FCC Rcd 19098 (1999) 4

Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, First Report, 9 FCC Rcd 7442 (1994) 23

Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal and Vertical Ownership Limits, Second Report and Order, 8 FCC Rcd 8565 (1993) 4

CONSTITUTION, STATUTES, REGULATIONS, AND RULES

U.S. Const. Amend. I ..... *passim*

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No 102-385, 106 Stat. 1460 ..... 1, 3

47 U.S.C. § 533(b) 29

TABLE OF AUTHORITIES—Continued

	Page
47 U.S.C. § 533(f)	3
47 U.S.C. § 533(f)(1)(A)	1, 4, 17, 27
47 U.S.C. § 533(f)(1)(B)	1, 4, 17, 26
47 U.S.C. § 534	3
47 U.S.C. § 535	3
47 U.S.C. § 536	3, 4
47 U.S.C. § 536(a)(3)	5, 26
47 U.S.C. § 543	3
47 U.S.C. § 548	4
Sherman Act, 15 U.S.C. §§ 1 *et seq.*	5
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56	2
28 U.S.C. § 1254(1)	3
28 U.S.C. § 1331	5
47 C.F.R.:	
§ 76.503	4
§ 76.504	4
§ 76.1301(c)	26
Sup. Ct. R. 10(c)	3

LEGISLATIVE MATERIALS

136 Cong. Rec. (daily ed. Sept. 28, 1990):	
p. S14,182	4, 24
p. S14,185	4, 24
S. Rep. No. 92, 102d Cong., 1st Sess. (1991)	*passim*

OTHER MATERIALS

National Telecommunications and Information Administration, *Video Program Distribution and Cable Television; Current Policy Issues and Recommendations* (1988)	23

IN THE

Supreme Court of the United States

No. ——

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Time Warner Entertainment Company, L.P., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. This case involves a First Amendment challenge to two provisions of a federal statute, the Cable Television Consumer Protection and Competition Act of 1992. The subscriber-limits provision, 47 U.S.C. § 533(f)(1)(A), directs the Federal Communications Commission ("FCC") to limit the number of subscribers that operators of cable-television systems may serve. The channel-occupancy provision, *id.* § 533(f)(1)(B), directs the FCC to limit the amount of their own speech that cable operators may provide over their cable systems.

Cable television is a vast electronic medium that is responsible for bringing Americans much of their news, information, and entertainment. The importance of cable television is reflected in the frequency with which this Court has reviewed the

constitutionality of laws regulating speech in the cable medium. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878 (2000) (striking down 1996 Telecommunications Act's "signal bleed" provision, which required cable operators either to scramble sexually explicit channels or to limit programming to certain hours); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (holding that provision of 1992 Cable Act permitting operator to prohibit patently offensive or indecent programming on public access channels violated First Amendment; that similar provision on leased access channels did not violate First Amendment; and that "segregate and block" provision with respect to leased access channels violated First Amendment); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*") (vacating judgment that had upheld must-carry rules); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*") (sustaining must-carry rules after remand).

This case is a natural successor in the series of this Court's decisions regarding cable television. It involves related portions of the statute whose constitutionality this Court reviewed in *Turner I* and *Turner II*. But the statutory provisions at issue here, unlike the more subtle ones involved in *Turner I* and *Turner II*, are textbook violations of free speech: the subscriber-limits provision is akin to a flat limit on the number of copies a newspaper may print, and the channel-occupancy provision is exactly analogous to a law limiting the column space that a newspaper may fill with its own editorial content, as opposed to the content of wire services. Congress's undisputed purpose in enacting these provisions, moreover, was to suppress cable operators' speech not for some reason wholly unrelated to what was being communicated but rather to bring about a mix of speech content more in accord with Congress's view about what the public should see and hear.

The court of appeals was able to sustain these remarkable provisions only by fundamentally misinterpreting *Turner I*, *Turner II*, and other First Amendment decisions of this Court.

The patently quantity-suppressing and content-based nature of the challenged provisions, the vital importance of the cable medium, and the court of appeals' misapplication of this Court's precedents, combine to warrant certiorari in this case. *See* Sup. Ct. R. 10(c).

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 211 F.3d 1313. The opinion of the district court (Pet. App. 18a-40a) is reported at 835 F. Supp. 1.

JURISDICTION

The court of appeals entered its judgment on May 19, 2000. The court of appeals denied a timely petition for panel rehearing and rehearing en banc on July 21, 2000. Pet. App. 41a-42a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." Relevant provisions of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 533(f), 536, are set forth at Pet. App. 43a-45a.

STATEMENT

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("the 1992 Cable Act" or "the Act"). The Act subjected cable operators to wide-ranging regulation. Among other things, the Act imposed "must carry" obligations (requiring cable operators to retransmit the signals of local broadcast stations), *see* 47 U.S.C. §§ 534, 535, regulated cable rates, *see id.* § 543, and contained various provisions

purportedly designed to promote competition, *see*, *e.g.*, *id.* §§ 536, 548.

This case centers on two provisions of the Act limiting the amount of their own speech that cable operators may communicate to their audiences. Each of these provisions was enacted over the opposition and ultimate veto of the Bush Administration, which found the provisions objectionable on First Amendment grounds. *See* 136 Cong. Rec. S14,182, S14,185 (daily ed. Sept. 28, 1990) (Statement of Administration Policy) ("The Administration opposes [this provision], which limits the number of channels on which a cable operator can carry its own programs. This provision raises most serious constitutional questions. [It] would also require limits on the number of subscribers a cable operator may serve nationwide. This provision is objectionable because current antitrust laws are adequate.").

The subscriber-limits provision, 47 U.S.C. § 533(f)(1)(A), directs the Federal Communications Commission ("FCC") to limit the number of subscribers that a cable operator may reach. The channel-occupancy provision, *id.* § 533(f)(1)(B), directs the FCC to limit the number of channels on a cable system that a cable operator may fill with its own cable-programming services—thereby limiting the amount of their own speech cable operators may provide over their cable systems.[1]

The purpose of these two provisions is set forth in the Senate Report that accompanied the bill that was eventually enacted

---

[1] Pursuant to the challenged provisions, the FCC established a subscriber limit of 30 percent of the Nation's subscribers and a channel-occupancy limit of 40 percent of each cable system's channels. *See* 47 C.F.R. §§ 76.503, 76.504; *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal and Vertical Ownership Limits*, Second Report and Order, 8 FCC Rcd 8565 (1993); *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, Third Report and Order, 14 FCC Rcd 19098 (1999). Petitions for review of the FCC rules are now under consideration in the D.C. Circuit.

into law. The Senate Report states that "there are special concerns about concentration of the media in the hands of a few who may control the dissemination of information. The concern is that the media gatekeepers will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both." S. Rep. No. 92, 102d Cong., 1st Sess. 32 (1991) ("S. Rep."). Put differently, Congress was concerned that large cable operators would exert too much influence in public discourse. As a remedy, Congress suppressed the speech of large cable operators in favor of speakers likely to engage in unorthodox or unpopular expression.

In a different provision of the 1992 Cable Act (not challenged here), Congress specifically prohibited cable operators from discriminating against unaffiliated cable-programming services. *See* 47 U.S.C. § 536(a)(3). Discrimination based solely on ownership status could also raise antitrust issues under the Sherman Act. *See* 15 U.S.C. §§ 1 *et seq*. Congress nonetheless enacted the subscriber-limits and channel-occupancy provisions, which purport to provide prophylactic guards against such discrimination.

2. Time Warner challenged the constitutionality of the subscriber-limits and channel-occupancy provisions by filing suit in district court, predicating jurisdiction on 28 U.S.C. § 1331. Relying on numerous uncontradicted affidavits, Time Warner moved for summary judgment on the constitutionality of the provisions in question. Pet. App. 2a, 19a. Time Warner argued that each of the challenged provisions was content-based and therefore subject to strict First Amendment scrutiny, which the Government conceded neither provision could survive. Time Warner further argued that, even if only intermediate First Amendment scrutiny applied, the provisions were still invalid because the Government had failed to demonstrate that either provision constituted a narrowly tailored response to a real, non-

conjectural problem. The Government adduced no affidavit or other evidence in response.

The district court granted Time Warner declaratory and injunctive relief with respect to its claim that the subscriber-limits provision violates the First Amendment, *see id.* at 34a, 40a, and denied Time Warner such relief with respect to its claim that the channel-occupancy provision violates the First Amendment, *see id.* at 28a n.11, 40a. With respect to the subscriber-limits provision, the district court held that, even if, as the Government contended, the provision were subject to no more than intermediate scrutiny, the provision violated the First Amendment:

> Even content-neutral regulations may not burden substantially more speech than necessary, and must leave open ample alternative means of reaching an audience. *See Ward [v. Rock Against Racism]*, 491 U.S. [781,] 802-03 [(1989)]. Any governmentally ordained quota on the number of subscribers a cable operator may reach leaves the operator with absolutely no intra-medium means of speaking to the remainder of its potential audience. The First Amendment protects the right of every citizen to reach the minds of any willing listeners and, thus, the speaker's opportunity to win their attention. *Heffron [v. International Soc'y for Krishna Consciousness, Inc.]*, 452 U.S. [640,] 655 [(1981)] (citations omitted).

Id. at 35a. But the district court granted the Government's motion for summary judgment with respect to the channel-occupancy provision. *See id.* at 28a n.11. According to the court, "the channel occupancy limits appear unrelated to content." *Id.*

3. The court of appeals affirmed in part and reversed in part, upholding both challenged provisions. *See id.* at 17a. In the court of appeals' view, both provisions were content-neutral and therefore did not trigger strict scrutiny. *See id.* at 3a-8a, 12a-

15a. Applying intermediate scrutiny, the court of appeals held that both provisions withstood First Amendment review.

a. The court of appeals recognized that the measures were direct limits on the quantity of cable operator speech—limits on "the number of subscribers a cable operator may reach" and on "the number of channels on a cable system that may be devoted to video programming in which the operator has a financial interest." *Id.* at 1a-2a. The court also acknowledged that, in enacting the provisions, Congress deliberately suppressed large cable operators' speech out of a concern "that cable operators would impose their own biases upon the information they disseminate," *id.* at 9a, and that Congress thus acted in an effort to "increase the diversity of voices available to the public via cable," *id.* at 15a. But that purpose did not render the provisions content-based, in the court of appeals' view, because "the Supreme Court made quite clear in *Turner I*" that "making way for some speakers, in the cable context where that necessarily means limiting the speech of others, is not inherently content-based." *Id.* at 6a.

The court of appeals acknowledged that the *Turner I* Court's "acceptance of the must-carry obligation as content-neutral rested in large part upon the Court's understanding that the purpose of the statute was to maintain the availability of broadcast television for those without cable." *Id.* But, the court of appeals said, "[t]he Court also identified the 'bottleneck monopoly power' of the cable operator, arising out of the operator's 'control over most (if not all) of the television programming that is channeled into the subscriber's home,' as the threat to broadcast television." *Id.* at 6a-7a (quoting *Turner I*, 512 U.S. at 656-57, 661).

From this Court's mention of cable's "bottleneck" power, the court of appeals deduced that, in the special context of the cable medium, Congress may suppress speakers in the name of overall speech diversity without triggering strict scrutiny—at least so long as it does not express a preference for or a bias against

the specific content of either the promoted or the suppressed speech or speaker. *See id.* at 7a, 13a-14a. Thus, the court of appeals opined that strict scrutiny did not apply because Congress's "concern was not with what a cable operator might say, but that it might not let others say anything at all in the principal medium for reaching much of the public." *Id.* at 7a. And, according to the court of appeals, a desire to increase speech diversity alone does not necessarily amount to a content preference. "By placing a value upon diversity," the court said, "Congress did not necessarily also value one speaker, or one type of speech, over another; it merely expressed its intention that there continue to be multiple speakers." *Id.*; *see id.* at 14a.

b. Having thus decided that only intermediate First Amendment scrutiny applied, the court of appeals held that both provisions passed muster. According to the court of appeals, self-interested testimony by independent programmers before Congress to the effect that large cable operators "'have the market power to determine what programming services can "make it" on cable'" constituted "substantial evidence" that the subscriber-limits provision addressed a non-conjectural threat of harm. *Id.* at 10a-11a (quoting S. Rep. at 33). In effect, the court of appeals determined that substantial evidence was not necessary at all: it found that the challenged provisions rested simply on "economic common sense." *Id.* at 17a.

Nor was the court of appeals troubled by the fact that Congress had attacked the harm feared with no fewer than four layers of increasingly drastic measures: generally applicable antitrust laws, the anti-discrimination provision, the channel-occupancy provision, and the subscriber-limits provision. Said the court of appeals: "In the subscriber limits provision the Congress took a structural approach to the regulation of cable operators, whereas the antidiscrimination provision of the 1992 Cable Act and the antitrust laws are behavioral prohibitions. As a structural limitation, the subscriber limits provision adds a prophylaxis to the law and avoids the burden of individual

proceedings to remedy particular instances of anticompetitive behavior." *Id.* at 12a. The court of appeals upheld the channel-occupancy provision as "a prophylactic, structural limitation" as well. *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

This case presents two fundamental First Amendment questions:

(a) whether strict scrutiny is triggered when Congress imposes direct limits on the quantity of a cable operator's expression in an attempt to enhance the overall diversity of speech content within the cable medium; and

(b) whether a law restricting speech as a "structural" "prophylaxis" is invalid under intermediate scrutiny when it is justified only by speculation undermined rather than supported by the record evidence.

The court of appeals misapplied *Turner I*, as well as other governing precedents of this Court, in addressing those questions. First, the court of appeals misinterpreted *Turner I* as holding that the subscriber-limits and channel-occupancy provisions are subject to no more than intermediate First Amendment scrutiny. These provisions are *direct* limits on the quantity of speech qua speech, while *Turner I* involved merely an access rule *indirectly* displacing speech premised on a rationale that this Court determined was not related in any way to speech. In addition, the court of appeals held that, under *Turner I*, the subscriber-limits and channel-occupancy provisions could be deemed content-neutral, despite Congress's explicit acknowledgment that the purpose of those provisions was to promote "unorthodox" and "unpopular" speech and to stop cable operators supposedly from "slant[ing] information according to their own biases." S. Rep. at 32.

This Court should grant review to establish that, in the cable medium no less than in other media, (a) direct limits on the

quantity of speech automatically trigger strict scrutiny, even if they are content-neutral, and (b) speech suppression in the name of content diversity is unavoidably content-based and therefore again triggers strict scrutiny. This Court should establish that cable television cuts no special hole in the fabric of the First Amendment.

Moreover, the court of appeals interpreted *Turner I* and *Turner II* as holding that intermediate scrutiny can be satisfied by speculation masquerading as "common sense" (Pet. App. 17a) rather than by record evidence, and that a law serving as a "structural" "prophylaxis" is permissible under intermediate scrutiny—even when the Government's objective can be addressed, and indeed has been addressed, by more narrowly tailored remedies that do not interfere with speech.

This Court should grant certiorari to address the court of appeals' misinterpretation of *Turner I* and *Turner II* and to resolve fundamental First Amendment questions in an electronic medium of vital significance in today's society.

I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT, IN CABLE AS WELL AS IN OTHER MEDIA, DIRECT LIMITS ON THE QUANTITY OF SPEECH AIMED AT ENHANCING THE DIVERSITY OF CONTENT TRIGGER STRICT SCRUTINY.

A. Direct Limits on Speech Quantity Trigger Strict Scrutiny Even if They Are Content-Neutral.

The subscriber-limits and channel-occupancy provisions are direct limits on the quantity of speech that cable operators may communicate to their audiences. They are analogous to rules limiting the number of copies a newspaper may print and limiting the column space that a newspaper may fill with its own editorial content. Relying on *Turner I*, the court of appeals applied intermediate First Amendment scrutiny. Yet laws directly

targeting speech and capping its quantity are properly subject to strict First Amendment scrutiny, *whether or not they are deemed to be content-based. See, e.g., Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105, 126 (1991) (Kennedy, J., concurring in the judgment) (cataloguing cases involving content-neutral laws in which the Court has applied strict scrutiny).

In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), for example, this Court invalidated a sales tax imposed on newspapers with a circulation of more than 20,000 per week—a financial penalty on subscribership that was less severe than the strict limits imposed here by the subscriber-limits and channel-occupancy provisions. *Grosjean* held that the tax's unmistakable tendency "to limit the circulation of information to which the public is entitled" rendered it wholly inconsistent with the First Amendment. *Id.* at 250. Similarly, in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), this Court applied "exacting scrutiny" to expenditure limitations that were "direct and substantial restraints on the quantity" of speech itself, *id.* at 39, 44-45, even though they were "neutral as to the ideas expressed," *id.* at 39. In *Meyer v. Grant*, 486 U.S. 414 (1988), this Court employed "exacting scrutiny" to strike down a ban on the use of paid petition circulators, which "impose[d] a direct restriction which 'necessarily reduces the quantity of expression.'" *Id.* at 419, 420 (citing *Buckley*). *Meyer* held that the law could not stand because it "limit[ed] the number of voices who will convey appellees' message and the hours they can speak and, therefore, limit[ed] the size of the audience they can reach." *Id.* at 422-23; *see also City of Ladue v. Gilleo*, 512 U.S. 43, 55 & n.13 (1994) (laws banning entire category of speech may be subject to strict scrutiny even if not deemed content-based); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (applying strict scrutiny to content-neutral law that prohibited grand jury witness from publicly disclosing his own testimony after grand jury's term ended).

This Court has never suggested that a direct limit on the quantity of speech as such may be subject to anything less than strict scrutiny. Instead, this Court has held that intermediate First Amendment scrutiny is reserved for certain special categories of laws, for which the subscriber-limits and channel-occupancy provisions cannot qualify. For example, this Court has applied intermediate scrutiny to restrictions on "conduct" having merely an "incidental" effect on speech when applied to a particular example of that conduct that happens to be expressive. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567, 570 (1991) (plurality opinion); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 298 (1984); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). The *O'Brien* test is triggered only when "'speech' and 'nonspeech' elements are combined in the same course of conduct," 391 U.S. at 376—that is, where a law applies to "speech-plus" or to conduct "intertwined" or "intermingled" with speech.[2] Where (as here) a ban falls on speech, and speech alone, intermediate scrutiny is wholly inapplicable. *See Cohen v. California*, 403 U.S. 15, 18 (1971) ("The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech,' . . . not upon any separately identifiable conduct . . . . Cf. *United States v. O'Brien.*").

Similarly, this Court has applied intermediate scrutiny to time, place, or manner rules restricting the noncommunicative aspects of a speaker's activity, such as its decibel level, in order to limit its nuisance impact on others. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781 (1989). It has long been axiomatic that, in order to qualify for less than strict scrutiny, such rules must not interfere with a speaker's ability to communicate

---

[2] *See American Radio Ass'n v. Mobile Steamship Ass'n*, 419 U.S. 215, 231 (1974); *Cameron v. Johnson*, 390 U.S. 611, 617 (1968); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 (1968).

his or her chosen content to *all* members of the desired audience.[3]

The subscriber-limits and channel-occupancy provisions, which directly cap the quantity of speech a cable operator may communicate to its audience, plainly cannot qualify for the more relaxed scrutiny accorded to such mere time, place, or manner rules. Accordingly, the provisions are properly subject to strict First Amendment scrutiny, which the Government conceded below they could not survive.

B. Speech Suppression in the Name of Content Diversity Triggers Strict Scrutiny.

In adopting the subscriber-limits and channel-occupancy provisions, Congress stated that its purpose was to address the "concern" that cable operators "will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both." S. Rep. at 32. The court of appeals acknowledged that, in enacting the challenged provisions, Congress deliberately suppressed large cable operators' speech specifically out of a concern "that cable operators would impose their own biases upon the information they disseminate," Pet. App. 9a, and that Congress thus acted in an effort to "increase the diversity of voices available to the public via cable," *id.* at 15a, by limiting the reach of the set of voices Congress wanted to stifle—those of cable operators. Despite these remarkable concessions, the

---

[3] *See, e.g., Ward*, 491 U.S. at 802; *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-09 (1984) (under *Schneider v. New Jersey*, 308 U.S. 147 (1939), ban on leafleting in public streets cannot be considered time, place, or manner rule); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (ban on handbilling in public areas could not be considered a "time, place, or manner" rule because "[t]here is . . . no restriction in [the] application [of the ban on circulars] with respect to time or place," in that "[i]t is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets").

court of appeals held that, based "upon examination of the statute, the Senate Report that accompanied it, and the Supreme Court's analysis of the must-carry provision at issue in *Turner I*," the statutory provisions at issue were "not content-based." *Id.* at 8a; *see id.* at 15a.

Suppressing the expression of certain speakers in order to promote "diversity" inherently entails a content-based purpose. Under the court of appeals' holding, government may escape strict scrutiny whenever it silences especially popular, powerful, or persuasive speakers—or, indeed, *any* category of speakers—under the seductive banner of "diversity." Yet such efforts would be in flat violation of the fundamental principle "[a]t the heart of the First Amendment . . . that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner I*, 512 U.S. at 641.

In this case, the court of appeals held that, "[b]y placing a value upon diversity and competition in cable programming the Congress did not necessarily also value one speaker, or one type of speech, over another; it merely expressed its intention that there continue to be multiple speakers." Pet. App. 7a. That reasoning was plainly suspect, however, for the Committee Report accompanying the statutory provisions in this case confirmed that Congress indeed valued what it viewed as "unorthodox or unpopular speech" over the speech of large cable operators. S. Rep. at 32.

More fundamentally, *any* suppression of speech in the name of "diversity" has an inevitably content-based character. A restriction deliberately changing the mix of speakers in the name of "diversity," "balance," or any similarly evaluative characterization is inherently content-based. Among other things, it necessarily rests on an assumption that the speakers the restriction is designed to include will utter speech with a content distinct from that which would have been expressed by the speakers the law is designed to displace. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), for example, this Court struck

down a measure that prohibited various categories of corporations from expending funds in connection with ballot initiatives. In response to the State's defense that "corporations are wealthy and powerful and their views may drown out other points of view," *id.* at 789, the Court stated (in words that appear particularly apt here) "one might argue with comparable logic that the State may control the volume of expression by the wealthier, more powerful corporate members of the press in order to 'enhance the relative voices' of smaller and less influential members." *Id.* at 791 n.30. As this Court tersely concluded, "this concept contradicts basic tenets of First Amendment jurisprudence." *Id.*; *see Buckley*, 424 U.S. at 48-49 ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"); *see also id.* at 17.[4]

---

[4] *See also Turner I*, 512 U.S. at 677-78 (O'Connor, J., joined by Scalia, Thomas, and Ginsburg, JJ., concurring in part and dissenting in part) (preference for diversity is content-based); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 616-17 (1990) (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting) ("The FCC's extension of the asserted interest in diversity of views in these cases presents, at the very least, an unsettled First Amendment issue. The FCC has concluded that the American broadcasting public receives the incorrect mix of ideas and claims to have adopted the challenged policies to supplement programming content with a particular set of views. Although we have approved limited measures designed to increase information and views generally, the Court has never upheld a broadcasting measure designed to amplify a distinct set of views or the views of a particular class of speakers. Indeed, the Court has suggested that the First Amendment prohibits allocating licenses to further such ends."); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of California*, 475 U.S. 1, 14, 20 (1986) (plurality opinion) ("the State's asserted interest in exposing appellant's customers to a variety of viewpoints is not—and does not purport to be—content neutral"); *id.* at 24-25 (Marshall, J., concurring in the judgment) (same); *Time Warner Cable v. City of New York*, 943 F. Supp. 1357, 1397 (S.D.N.Y. 1996) (opining that diversity of programming is not necessarily "a constitutionally permissible purpose when the City has favored specific speakers in pursuit of this goal" and that "the City's intonation of the rubric

C. This Court Should Grant Review To Hold That There Is No "Cable Exception" to the First Amendment.

The D.C. Circuit interpreted *Turner I* as rendering inapplicable the imposing and venerable body of First Amendment jurisprudence according strict scrutiny to direct, content-based limits on speech. The court of appeals held that the subscriber-limits and channel-occupancy provisions could be subject to intermediate scrutiny even though (a) they directly limit the quantity of cable operator speech and cannot qualify as "conduct" restrictions or as time, place, or manner rules, and (b) they suppress speech in the name of diversity and thus are content-based. But *Turner I* does not support—to the contrary, it contradicts—any notion that there are special, cable-specific First Amendment rules. This Court should grant review to establish that First Amendment principles apply with no less force in the cable medium.

1. This Court should make clear that direct limits on the *quantity* of cable speech, like the subscriber-limits and channel-occupancy provisions, trigger strict scrutiny even if they are deemed to be content-neutral. The D.C. Circuit erred in interpreting *Turner I* as holding otherwise, for *Turner I* did not even *involve* a law that directly limited the quantity of any speaker's expression. Although the must-carry provisions by definition had an indirect effect on speech by "coincidentally inhibit[ing] some freedom of choice of the cable operators as to whose signals are to be carried," *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32, 45 (D.D.C. 1993) (three-judge court), "any burden imposed by the [must-carry rules] on speech" was "remote and incidental," *id.* at 51 (Sporkin, J., concurring). This Court emphasized that the must-carry rules "do not

---

'diversity' is a thinly disguised reference to its preference for the editorial content of Fox News"), *aff'd on other grounds*, 118 F.3d 917 (2d Cir. 1997).

produce any net decrease in the amount of available speech," "leave cable operators free to carry whatever programming they wish on all channels not subject to must-carry requirements," and do not "diminish the free flow of information and ideas." *Turner I*, 512 U.S. at 647, 656. The three-judge district court had observed that "the burdensomeness of the must-carry provisions is illusory in the potentially significant number of cases in which a cable operator receives a carriage request from an operator it would have carried even in the absence of the request." 819 F. Supp. at 47 n.29. This Court found that "cable operators nationwide carry 99.8 percent of the programming they carried before enactment of must-carry." *Turner II*, 520 U.S. at 214.

The subscriber-limits and channel-occupancy provisions are the *very opposite* of the must-carry rules upheld in *Turner II*. Rather than being access requirements, they are prohibitory, must-*not* carry rules that direct the FCC to set rigid limits on how much speakers in this vital medium may say—to how many subscribers they may transmit their mix of channels and programs, *and* over how many channels they may transmit their own or any affiliated entity's programming as opposed to the programming of others. This Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995), compared a cable operator's speech with that of a parade organizer in arranging a parade composed of a number of distinct floats, marching bands, and contingents of various kinds. Stripped to its essence, the subscriber-limits provision of Section 533(f)(1)(A) sets a ceiling on the number of people a parade may invite as viewers, and the channel-occupancy provision of Section 533(f)(1)(B) sets a cap on the number of floats and marching bands in which the parade organizer has an interest may be included in the procession. The subscriber-limits and channel-occupancy provisions directly cap the quantity of

cable operators' speech and accordingly trigger strict scrutiny under the First Amendment.[5]

2. In addition, this Court should grant review to establish that speech suppression in the name of content diversity triggers strict scrutiny in the cable medium no less than in other media. The court of appeals below maintained that, even if measures suppressing speech in the name of diversity are generally content-related, *Turner I* held this principle inapplicable in the special context of the cable medium. *See* Pet. App. 5a-8a. However, *Turner I* did *not* suggest that Congress was entitled to enhance the "diversity" of the content mix available on cable—because cable was viewed as a supposed bottleneck or because its subscribers suffered from a supposed "deficient" mix of programming—without triggering strict scrutiny. Instead, the Court quite specifically held in *Turner I* that Congress had acted *not* to change the content available on cable but rather to ensure the continued availability of free over-the-air television programming for those who did not subscribe to cable, by safeguarding the economic viability of the over-the-air stations. *See* 512 U.S. at 646; *see also id.* at 649, 652, 658-59; *Turner II*, 520 U.S. at 225-29 (Breyer, J., concurring). This Court noted that the must-carry rules "do not grant access to broadcasters on the ground that the content of broadcast programming will counterbalance the messages of cable operators." *Turner I*, 512 U.S. at

---

[5] *United States v. Vopper*, No. 99-1728, and *Bartnicki v. Vopper*, No. 99-1687 (oral argument scheduled for Dec. 5, 2000), also raise the questions of the circumstances under which laws directly targeting expression trigger strict scrutiny and the quantum of record evidence required to sustain such a restriction on speech. Similarly, *FEC v. Colorado Republican Federal Campaign Committee*, No. 00-191 (cert. granted, Oct. 10, 2000), presents the question whether direct federal limits on the amount of campaign expenditures a political party may make in coordination with the party's congressional candidates violate the First Amendment. At a minimum, the instant petition for a writ of certiorari should be held in abeyance pending the Court's decisions in *Vopper* and *Colorado Republican Federal Campaign Committee*.

655. As this Court later summarized it, "[t]he Government's interest in *Turner Broadcasting* was not the alteration of speech." *Hurley*, 515 U.S. at 577. Indeed, the Court warned that the must-carry rules *would* have triggered strict scrutiny if Congress's purpose in enacting them *had* been "to exercise content control over what subscribers view on cable television." *Turner I*, 512 U.S. at 652. And this Court expressly acknowledged that a measure suppressing speech in an effort to promote content diversity within the cable medium plainly *would* have constituted such a content-based law: the Court explained that any measure "designed to ensure that the . . . speech of [some] not drown out the speech of others" would necessarily be "concerned with the communicative impact of the regulated speech" and would thereby trigger strict scrutiny. *Id.* at 658. The D.C. Circuit incorrectly read *Turner I* to stand for the proposition that, because of the unique attributes of cable, congressional efforts to increase the diversity of programming available to cable subscribers justified the application of merely intermediate scrutiny. That, however, is not what this Court held in *Turner I*.

Accordingly, this Court should grant review to vindicate the fundamental principle that a governmental purpose to increase diversity by suppressing speech is content-based—whether inside or outside the cable medium.

3. Given the dynamic nature of the various electronic media and the fluidity of boundaries between them, courts should be hesitant to frame medium-specific First Amendment rules—especially if those rules are tied to the particular characteristics of a specific medium at a certain moment in time. The First Amendment, and the Constitution of which it is part, is a framework for all seasons, one whose principles are suitable for all times and all technological landscapes. The axiom that government may not control information content is a basic rule that extends to all media; it does not vary with accidents of technology. Judgments about the value of information and ideas "are for the individual to make, not for the Government to

decree, even with the mandate or approval of a majority. *Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.*" *Playboy Entertainment*, 120 S. Ct. at 1889 (emphasis added). Thus, in *Denver Area*, a plurality warned that, "aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now." 518 U.S. at 742 (citations omitted).[6]

The court of appeals in this case held that strict scrutiny was inapplicable because of the "cable operator's bottleneck monopoly," which the court described as a "physical and economic barrier to . . . intra-medium competition." Pet. App. 13a-14a. The court of appeals reached its decision based on the legislative history of the 1992 Cable Act and the 1994 decision by this Court in *Turner I* relying on the 1992 Cable Act and its history. The court of appeals ignored altogether such developments as the emergence of the Internet and the contemporary ability of broadcast television, broadband telephone networks, and direct broadcast satellites to deliver video programming to the public.

---

[6] *See also* 518 U.S. at 768 (Stevens, J., concurring) ("it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this"); *id.* at 776 (Souter, J., concurring) ("All of the relevant characteristics of cable are presently in a state of technological and regulatory flux. . . . [W]e can hardly settle rules for review of regulation on the assumption that cable will remain a separable and useful category of First Amendment scrutiny."). Even those Justices who took a different tack in the *Denver Area* case stressed that First Amendment principles should not be watered down in the cable context. *See, e.g.*, *id.* at 781 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles.").

In *Turner I*, this Court most assuredly did not hold that any special physical or economic characteristics inherent in the cable medium automatically and for all time ruled out strict scrutiny for restrictions on cable speech. To the contrary, this Court *rejected*, at 512 U.S. at 637-40, the Government's argument that cable was entitled to no more than the level of First Amendment protection applicable to the broadcasting medium under *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). *Turner I* has been described as holding "that cable operators are generally entitled to much the same First Amendment protection as the print media." *Denver Area*, 518 U.S. at 815 (Thomas, J., concurring in the judgment in part and dissenting in part). *Turner I* stressed that, "whatever relevance [the unique physical characteristics of cable transmission] may have in the evaluation of particular cable regulations, they do not require the alteration of settled principles of our First Amendment jurisprudence." 512 U.S. at 639; *see also Denver Area*, 518 U.S. at 748 (plurality opinion); *Turner I*, 512 U.S. at 675-76 (O'Connor, J., concurring in part and dissenting in part).

The court of appeals radically misapplied *Turner I* by deciding that cable operators and their would-be audiences, now and seemingly forever, are not entitled to the same constitutional protection as are members of the print media and their readers. Although the supposed existence of a cable "bottleneck" may be relevant to a governmental interest, it puts the cart before the horse (and fossilizes the horse) to treat the asserted physical or economic characteristics of the medium at issue as of some point in the past (Pet. App. 6a-7a) as lowering the otherwise applicable standard of review at the *outset* of the constitutional analysis. *See, e.g., Turner I*, 512 U.S. at 640 ("the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media"); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 249 & n.13, 251, 256, 258 (1974) (no diminished constitutional protection despite monopolies in newspaper markets).

Under the court of appeals' approach, the First Amendment law of cable television will evidently be frozen as the medium arguably existed circa 1992 or 1994—without any inquiry into ever-changing technological realities such as the development of the Internet, which this Court has already recognized as "a unique and wholly new medium of worldwide human communication." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997) (citation omitted). The court of appeals' holding thus flies in the face of the fundamental principle that a statute's constitutionality must be re-assessed in light of changed circumstances, for "[a] statute [constitutionally] valid when enacted may become invalid by change in the conditions to which it is applied." *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935); *see also Baker v. Carr*, 369 U.S. 186, 254 n.6 (1962) (Clark, J., concurring) (same); *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924) (Holmes, J.) ("A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.").

II. THIS COURT SHOULD GRANT REVIEW TO REAFFIRM THAT AVOWEDLY PROPHYLACTIC SPEECH-RESTRICTING PROVISIONS CANNOT SATISFY INTERMEDIATE SCRUTINY BASED ON MERE SPECULATION.

The court of appeals' judgment merits review for the additional reason that it conflicts with decisions of this Court formulating and applying intermediate First Amendment scrutiny.

A. This Court Should Grant Review To Establish That Intermediate Scrutiny Cannot Be Satisfied by Supposed "Common Sense" in the Face of Contrary Record Evidence.

The court of appeals identified as the problem addressed by the challenged measures the risk that large cable operators

might refuse to carry unaffiliated new programming services solely on anticompetitive grounds. *See* Pet. App. 10a-11a. But the only "evidence" to which the court of appeals pointed consisted of self-interested testimony in congressional hearings to the effect that large cable operators "'have the market power to determine what programming services can "make it" on cable.'" *Id.* at 10a (quoting S. Rep. at 33); *see id.* at 16a. The court of appeals pointed to no evidence that this has ever actually happened in the real world—let alone that non-carriage has caused injury so serious as to justify a significant burden on cable operators' speech.

Nor could it have done so. For example, even though the challenged provisions were purportedly intended to promote entry by independent cable-programming services, such entry was rampant even before the provisions took effect. During the period from 1993 to 1999—a period in which the subscriber-limits provision was stayed and not in force—the number of cable-programming services almost tripled, from 106 to 283. *Compare Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report, 9 FCC Rcd 7442, ¶ 161 n.434 (1994) ("*First Competition Report*") *with Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd 978, ¶ 179 (2000). In the same period, the share of integrated services fell from 53 to 37 percent. *Compare First Competition Report* ¶ 161 *with Sixth Competition Report* ¶ 179. Shortly before Congress acted, two government agencies (the FCC and the National Telecommunications and Information Administration) issued reports concluding that no real problem existed that would justify intervention. *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, Report, 5 FCC Rcd 4962, ¶¶ 76, 91, 127 (1990); NTIA, *Video Program Distribution and Cable Television; Current Policy Issues and Recommendations* 102, 106 (1988). The President, who vetoed the initial version of the 1992 Cable Act, took the position that

the provisions were "objectionable because current antitrust laws are adequate." 136 Cong. Rec. S14,182, S14,185 (daily ed. Sept. 28, 1990) (Statement of Administration Policy).

In the end, the court of appeals simply ignored the record evidence and held that evidentiary support was unnecessary. The court opined that the provisions could be sustained as a matter of "economic common sense." Pet. App. 17a. But the court of appeals pointed to no evidence at all that the incentive to discriminate would be likely to prevail so often over the incentive to provide attractive programming to subscribers as to give rise to a serious problem. Moreover, precisely the same "bit of economic common sense" embraced by the court of appeals was pressed unsuccessfully upon this Court in *Turner I*, where this Court demanded "a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied," 512 U.S. at 667 (plurality opinion), despite numerous factual findings set forth in the text of the 1992 Cable Act itself. During the past five years, the cable industry has become subject to ever-increasing competition from direct broadcast satellites and other sources, so that cable operators' incentive to provide optimal programming has only strengthened. Thus, if "economic common sense" could not obviate an empirical inquiry in *Turner I*, it certainly could not here.

The court of appeals' judgment thus squarely conflicts with *Turner I*, *Turner II*, and the numerous other decisions of this Court holding that, under intermediate scrutiny, restrictions on speech cannot be justified by unadorned speculation—even if labeled "common sense"—in the face of conflicting record evidence. In *Turner I*, a plurality of this Court explained that a reviewing court is obligated to exercise "independent judgment" to ensure that the Government has "demonstrate[d] that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 664, 666. In *Turner II*, this Court noted, in addition to the extensive factual findings made by Congress in the

text of the statute itself, "a record of tens of thousands of pages" supporting the rules. 520 U.S. at 187 (internal quotation marks omitted). The Court stressed that there was a "substantial basis to support Congress's conclusion that a real threat justified enactment of the must-carry provisions." *Id.* at 196. And the Court pointed to "specific support" for Congress's conclusion (*id.* at 197): "[s]ubstantial evidence" and "contemporaneous stud[ies]" regarding market structure and market power exercised by cable operators (*id.* at 202-03); and "[e]mpirical research in the record before Congress" (*id.* at 208). Nothing remotely comparable—and certainly no contemporary evidence relating to market conditions *today*—exists in this case.

Both this Court and the lower courts have rejected appeals to unsupported "common sense" of the very kind accepted by the court of appeals in this case. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), for example, a plurality of the Court agreed that "common sense" supported the State's argument that a ban on liquor advertising would reduce consumption (*id.* at 505) but nonetheless held that, "[a]lthough the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means, the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce marketwide consumption." *Id.* at 506 (citation omitted). "[W]ithout any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance." *Id.* at 505. Similarly, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Court acknowledged that "common sense" supported a ban on disclosing alcohol content on beer labels. *Id.* at 487. But the Court held that "the Government had failed to present any credible evidence showing that the disclosure of alcohol content would promote strength wars" (*id.* at 489) and that

the Government had submitted only "various tidbits" of "anecdotal evidence and educated guesses" (*id.* at 490).[7]

B. This Court Should Grant Review To Establish That Prophylactic Speech-Restricting Measures Are Invalid Under Intermediate Scrutiny.

The court of appeals gave further grounds for review by upholding the subscriber-limits and channel-occupancy provisions as permissibly "prophylactic," when they are obviously and intolerably overinclusive. Pet. App. 12a, 17a. In addition to the antitrust laws, the 1992 Cable Act's anti-discrimination provision already prohibits cable operators from discriminating against cable-programming services on the basis of affiliation. *See* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c). The channel-occupancy provision then adds a sweeping structural ban: it restricts the speech of cable operators by limiting the number of channels that may be devoted to programming in which they have a financial interest—thereby making impossible not only discrimination based solely on ownership status (already banned elsewhere) but also editorial judgment in favor of superior (if affiliated) programming. *See* 47 U.S.C. § 533(f)(1)(B). Finally, lest any affiliation-based discrimination

---

[7] *See also Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) ("'Th[e] [Government's] burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'") (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)); *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (same); *Ibanez v. Florida Dep't of Business & Prof'l Reg.*, 512 U.S. 136, 143 (1994) ("unsupported assertions" are "insufficient" to justify restrictions on speech); *Bailey v. Morales*, 190 F.3d 320, 324 (5th Cir. 1999) (invalidating regulation of chiropractor advertising, which was based on "common sense" and anecdotal evidence); *Harman v. City of New York*, 140 F.3d 111, 122 (2d Cir. 1998) (relying on *Turner I* to conclude that, under intermediate scrutiny, "the government cannot rely on assertions, but must show a basis in fact for its concerns").

somehow escape (a) the antitrust laws, (b) the anti-discrimination provision, *and* (c) the channel-occupancy provision, Congress adopted the subscriber-limits provision to prohibit cable operators from speaking to audiences of more than a certain size. *See id.* § 533(f)(1)(A). The apparent congressional thinking was that, if cable operators grow large enough—even if their growth reflects only the popularity of their speech—they might be able to "preclude new programming services from attaining the critical mass audience necessary to survive." Pet. App. 9a. By any measure, this piling of safeguard upon preventive safeguard is gross overkill.

The court of appeals held that the challenged provisions were nonetheless permissible because they "ad[d] a prophylaxis to the law and avoi[d] the burden of individual proceedings to remedy particular instances of anticompetitive behavior." *Id.* at 12a; *see id.* at 17a. But this Court has held that, under the First Amendment, "prophylaxis" is a ground for suspicion rather than approval. For example, in *Edenfield v. Fane*, 507 U.S. 761 (1993), this Court held that a flat ban on personal solicitations by accountants could not survive intermediate scrutiny as prophylaxis against fraudulent solicitations. Reaffirming the principle that "[b]road prophylactic rules in the area of free expression are suspect," *id.* at 777 (internal quotation marks omitted), this Court required a showing that personal solicitations were so likely to result in fraud that, without a flat ban, a serious risk of harm would remain. *Id.* at 774-77.[8]

---

[8] *See also Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 193 (noting "the availability of other regulatory options which could advance the asserted interests 'in a manner less intrusive to . . . First Amendment rights'"); *Coors Brewing*, 514 U.S. at 491 (citing "the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 & n.13 (1993) (considering possible alternatives to restriction on speech).

Moreover, this Court has specifically instructed that government cannot ban speech "prophylactically" in order to avoid the administrative burden of individual proceedings. It is *always* simpler to ban speech rather than to proceed on a case-by-case basis—easier to outlaw leafletting, for example, than to enforce a law against littering, and more efficient to bar all household soliciting than to enforce a law prohibiting soliciting at households that have posted "No Soliciting" signs. But this Court repeatedly has ruled "emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1988) (citing *Schneider v. New Jersey*, 308 U.S. 147 (1939), and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980)); *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985).

Lower courts have similarly rejected "prophylactic" provisions under intermediate scrutiny. For example, lower courts have struck down municipal exclusivity rules permitting only a single cable operator in a given city—akin to subscriber limits of zero for newly entering cable operators—on the ground that municipal governments must address directly the potential problem of disrupting traffic on city streets, rather than enacting prophylactic measures that deny access altogether to competing cable providers.[9] Lower courts have also invalidated a prophylactic ban on telephone company provision of video

---

[9] *See Preferred Communications, Inc. v. City of Los Angeles*, 13 F.3d 1327 (9th Cir.), *cert. denied*, 512 U.S. 1235 (1994); *Cox Cable Communications, Inc. v. United States*, 774 F. Supp. 633, 636-37 (M.D. Ga. 1991), *remanded*, 992 F.2d 1178 (11th Cir. 1993); *Jones Intercable of San Diego, Inc. v. City of Lake Elsinore*, No. SACV 90-636-GLT (C.D. Cal. Apr. 4, 1991); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 965-66 (N.D. Cal. 1987); *Century Federal, Inc. v. City of Palo Alto*, 648 F. Supp. 1465, 1475-78 (N.D. Cal. 1986); *cf. Cable Alabama Corp. v. City of Huntsville*, 768 F. Supp. 1484, 1502-04 (N.D. Ala. 1991) (invalidating under *O'Brien* municipal restriction on transfer of franchise).

programming[10] and a prophylactic opt-in rule to protect the privacy of subscriber information held by telecommunications carriers.[11]

Lest prophylaxis become an easy excuse for suppression of speech, and technological shibboleths an easy substitute for precise analysis and serious attention to empirical evidence, this Court should review the judgment below.

---

[10] *See Chesapeake & Potomac Tel. Co. of Virginia v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *vacated on other grounds*, 516 U.S. 415 (1996); *U S WEST, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash.), *aff'd*, 48 F.3d 1092 (9th Cir. 1994), *vacated on other grounds*, 516 U.S. 1155 (1996); *Pacific Telesis Group v. United States*, 48 F.3d 1106 (9th Cir. 1994), *vacated on other grounds sub nom. United States v. U S WEST, Inc.*, 516 U.S. 1155 (1996), *on remand*, 84 F.3d 1153 (9th Cir. 1996); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994); *NYNEX Corp. v. United States*, Civ. No. 93-323-P-C, 1994 WL 779761 (D. Me. Dec. 8, 1994); *GTE South, Inc. v. United States*, No. 94-1588-A (E.D. Va. Jan. 13, 1995), *remanded as moot*, No. 95-1738 (4th Cir. May 15, 1996); *United States Tel. Ass'n v. United States*, No. 1:94cv1961 (D.D.C. Feb. 14, 1995), *vacated and remanded as moot*, No. 95-5117, 1996 WL 587633 (D.C. Cir. Sept. 16, 1996); *Southwestern Bell Corp. v. United States*, Civ. A. No. 3:94-CV-193-D, 1995 WL 444414 (N.D. Tex. Mar. 27, 1995), *remanded as moot*, No. 95-10478 (5th Cir. Apr. 30, 1996); *Southern New England Tel. Co. v. United States*, 886 F. Supp. 211 (D. Conn. 1995); *see also GTE California, Inc. v. FCC*, 39 F.3d 940, 951 (9th Cir. 1994) (Noonan, J., dissenting) (concluding, where majority did not reach merits, that 47 U.S.C. § 533(b) was "counterproductive" and "does not even survive rationality review"). Ultimately, the litigation surrounding Section 533(b) became moot when Congress repealed the provision as part of the Telecommunications Act of 1996. *See United States v. Chesapeake & Potomac Tel. Co.*, 516 U.S. 415, 416 (1996) (*per curiam*).

[11] *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1237-39 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (2000).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7945

ROBERT D. JOFFE
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

October 19, 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5272

TIME WARNER ENTERTAINMENT CO., L.P.,
Appellee,

v.

UNITED STATES OF AMERICA,
Appellant.

Argued Dec. 3, 1999
Decided May 19, 2000

Appeal from the United States District Court
for the District of Columbia
(No. 92cv02494)

Before: GINSBURG, ROGERS and TATEL, *Circuit Judges.*

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, *Circuit Judge*:

The Time Warner Entertainment Company and the United States appeal from portions of the judgment in *Daniels Cablevision, Inc. v. United States*, 835 F.Supp. 1 (D.D.C. 1993). At issue is the facial constitutionality of two provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. 1460 (1992 Cable Act). The "subscriber limits provision" directs the Federal Communications Commission to limit the number of subscribers a cable operator may reach. 47 U.S.C. § 533(f)(1)(A). The "channel occupancy provision" directs

the Commission to limit the number of channels on a cable system that may be devoted to video programming in which the operator has a financial interest. *Id.* § 533(f)(1)(B). Time Warner argues that both provisions facially—that is, no matter how sensitively or sensibly they might be implemented—violate the First Amendment to the Constitution of the United States; the Commission argues the opposite. We conclude that both provisions are facially constitutional.

I. Background

Time Warner and other owners of cable television systems challenged the constitutionality of the subscriber limits, the channel occupancy, and various other provisions of the 1992 Cable Act in *Daniels Cablevision.* Upon cross-motions for summary judgment, the district court held that the subscriber limits provision is unconstitutional, *see* 835 F.Supp. at 10, but the channel occupancy provision is constitutional, *see id.* at 7 & n. 11.* The Government appealed the former ruling while Time Warner appealed the latter.

We consolidated both appeals with Time Warner's petition to this court for review of the regulations the Commission had promulgated to implement the two provisions. *See Time Warner Entertainment Co., L.P. v. Federal Communications Comm'n* (*Time Warner*), 93 F.3d 957, 979-80 (D.C.Cir.1996). In September 1999, however, after the consolidated cases had been scheduled for oral argument, the Commission initiated further rulemaking proceedings with respect to the two provisions. Consequently, we severed Time Warner's

---

* The district court at least appears to have found the channel occupancy provision constitutional on its face. The court noted in a footnote that "[l]ike the other vertical integration restrictions, the channel occupancy limits appear unrelated to content. Whether or not the regulations ultimately promulgated by the Commission will pass constitutional muster under [intermediate scrutiny] is, of course, at this point unclear." 835 F.Supp. at 7 n. 11.

statutory challenges from its petition for review of the regulations, held the latter in abeyance pending the completion of the further rulemaking, and heard oral argument on the constitutionality of the two statutory provisions that we address today.

II. Analysis

We review *de novo* the district court's grant of summary judgment. *See, e.g., Aka v. Washington Hospital Center*, 156 F.3d 1284, 1288 (D.C.Cir.1998).

A. The Subscriber Limits Provision

1. The Standard of Review

Time Warner argues that the subscriber limits provision is a content-based restriction of its ability to communicate with its audience, and as such is subject to strict scrutiny. *See Turner Broadcasting System, Inc. v. Federal Communications Comm'n (Turner I)*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (Court has applied "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"). The Government denies that the subscriber limits provision is content-based, and argues for an intermediate level of scrutiny. *See id.*

In order to determine the applicable standard of review, then, we must decide whether the subscriber limits provision is content-based. In general, the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). A law that singles out speech based upon the ideas or views expressed is content-based, whereas a law that "confer[s] benefits or impose[s] burdens on speech without reference to the ideas or views

expressed" is most likely content-neutral. *Id.* at 643, 114 S.Ct. 2445; *see also id.* at 661, 114 S.Ct. 2445 (law that does not "pose . . . inherent dangers to free expression, or present . . . potential for censorship or manipulation, [will not] . . . justify application of the most exacting level of First Amendment scrutiny").

As a cable operator, Time Warner exercises editorial discretion in selecting the programming it will make available to its subscribers. Time Warner argues that the Congress limited its ability to speak by restricting the number of subscribers—and therefore potential viewers—it may reach with the programming it has selected. That this limitation is content-based, according to Time Warner, is evident from the Senate Report that accompanied the final version of the 1992 Cable Act. *See* H.R. CONF. REP. NO. 102-862, at 81-82 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1133, 1263-64 (adopting provisions of Senate Bill, as described in Senate Report, S.REP. NO. 102-92, at 32 (1991) [hereinafter S. REP.]).

That Report indicated the Congress was concerned about increasing concentration of ownership and control in the cable industry:

> . . . First, there are special concerns about concentration of the media in the hands of a few who may control the dissemination of information. The concern is that the media gatekeepers will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both. . . .
>
> * * * *
>
> The second concern about horizontal concentration is that it can be the basis of anticompetitive acts. For example, a market that is dominated by one buyer of a

> product, a monopsonist, does not give the seller any of the benefits of competition. . . .

S. REP. at 32-33, 1992 U.S.C.C.A.N. at 1165-66.

Time Warner contends that the Congress's concern that media gatekeepers would "slant" information or fail to provide outlets for "unorthodox" speech reflects a preference for one type of content and an intent to suppress another, namely, the speech of cable operators. The Company likens the Congress's efforts to limit its speech to the restraints the Supreme Court held unconstitutional in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). *Buckley* involved a federal campaign finance law aimed at "equalizing the relative ability of individuals and groups to influence the outcome of elections" by limiting their political expenditures. *Id.* at 48, 96 S.Ct. 612. The Court rejected "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others [as] wholly foreign to the First Amendment." *Id.* at 48-49, 96 S.Ct. 612. *Bellotti* similarly involved a state statute that prohibited certain types of businesses from making contributions or expenditures for the purpose of influencing particular ballot initiatives. The Court reiterated the point it had made in *Buckley*: A state's effort to control some voices in order to "enhance the relative voices" of less influential speakers "contradicts basic tenets of First Amendment jurisprudence." *Bellotti*, 435 U.S. at 791 n. 30, 98 S.Ct. 1407 (noting exception "in the special context of limited access to the channels of communication" and citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969)).

The expenditure limit at issue in *Buckley*, like the prohibition at issue in *Bellotti*, was content-based because it "was concerned with the communicative impact of the

regulated speech." *Turner I*, 512 U.S. at 658, 114 S.Ct. 2445. As the Supreme Court made quite clear in *Turner I*, however, making way for some speakers, in the cable context where that necessarily means limiting the speech of others, is not inherently content-based. *Id.* at 643-45, 114 S.Ct. 2445. There the Court determined that the "must-carry" provision of the 1992 Cable Act, which required cable operators to "carry the signals of a specified number of local broadcast television stations," *id.* at 630, 114 S.Ct. 2445, was not content-based, and applied intermediate scrutiny in its review of that provision. Although the must-carry obligation restricted cable operators' speech by limiting the number of channels they could program at will, it did so in a content-neutral fashion and for a content-neutral reason, namely, to protect the interests of non-cable subscribers in maintaining the viability of the television broadcasting industry. *Id.* at 646, 114 S.Ct. 2445.

According to Time Warner, the subscriber limits provision expresses a hostility to the content of large cable operators' speech that did not underlie the must-carry obligation: The subscriber limits are meant to restrict large cable operators from presenting information in accord with their own "biases," in order thereby to promote a diversity of views in cable programming. Increasing the diversity of programming is not, Time Warner argues, among the ends the Supreme Court deemed content-neutral in *Turner I*.

Time Warner is correct that the Court's acceptance of the must-carry obligation as content-neutral rested in large part upon the Court's understanding that the purpose of the statute was to maintain the availability of broadcast television for those without cable; that does not render *Turner I* wholly inapplicable, however. The Court also identified the "bottle-neck monopoly power" of the cable operator, arising out of the operator's "control over most (if not all) of the television programming that is channeled into the subscriber's home,"

as the threat to broadcast television. 512 U.S. at 656-57, 661, 114 S.Ct. 2445. In enacting the subscriber limits, the Congress was concerned that cable operators might use that same bottleneck power to exclude other providers of cable programming. As with the must-carry obligation, its concern was not with what a cable operator might say, but that it might not let others say anything at all in the principal medium for reaching much of the public. *See id.* at 657, 114 S.Ct. 2445 ("The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas"). The must-carry obligation and the subscriber limits provision both preserve for consumers some competition in the provision of programming. The must-carry obligation preserves competition between broadcasters and the cable operator, while the subscriber limits preserve competition between the cable operator and its affiliated programmers on the one hand and unaffiliated providers of cable programming on the other. By placing a value upon diversity and competition in cable programming the Congress did not necessarily also value one speaker, or one type of speech, over another; it merely expressed its intention that there continue to be multiple speakers.

Finally, Time Warner argues that the subscriber limits provision improperly singles out for regulation the cable medium, as opposed to other video programmers such as Direct Broadcast Satellite (DBS) operators. Here it refers us to *Turner I*, 512 U.S. at 659, 114 S.Ct. 2445, where the Court observed, "Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." According to Time Warner, with the subscriber limits the Congress "targeted a small number of [the various] speakers" capable of purchasing and providing video programming, *id.* at 660,

114 S.Ct. 2445, without providing any justification for limiting the regulation to the cable medium.

In *Turner I*, however, the Court rejected Turner Broadcasting's claim of discrimination, stating that "[i]t would be error to conclude . . . that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Id.* at 660, 114 S.Ct. 2445. Indeed, the same unique characteristic of the cable medium that justified the imposition of the must-carry obligation is also invoked by the Government to justify the subscriber limits, namely, "the bottleneck monopoly power exercised by cable operators." *Id.* at 661, 114 S.Ct. 2445. In *Turner I* this bottleneck power was seen to jeopardize the viability of broadcast television; in this case, it arguably threatens diversity and competition in the provision of cable programming. As the Government notes, other video programmers such as DBS lack the bottleneck power of cable operators; nor do they reach nearly as many households as does cable.

In sum, upon examination of the statute, the Senate Report that accompanied it, and the Supreme Court's analysis of the must-carry provision at issue in *Turner I*, we conclude that the subscriber limits provision is not content-based. In order to determine whether it is constitutional, therefore, we apply intermediate, rather than strict scrutiny. *Id.* at 662, 114 S.Ct. 2445.

2. The Merits

A content-neutral regulation of speech "will be sustained under the First Amendment if it [1] advances important governmental interests unrelated to the suppression of free speech and [2] does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting System, Inc. v. Federal Communications Comm'n* (*Turner II*), 520 U.S. 180, 189, 117 S.Ct. 1174, 137 L.Ed.2d

369 (1997) (citing *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). If a regulation on speech is intended to redress an actual or an anticipated harm to an important governmental interest, then the Government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664, 114 S.Ct. 2445. Our review of the Congress's predictive judgments is deferential; we ask only whether, "in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner II*, 520 U.S. at 195, 117 S.Ct. 1174. Finally, we will uphold a regulation if the important governmental interest in question "would be achieved less effectively absent the regulation" and the regulation does not "burden substantially more speech than is necessary to further that interest." *Id.* at 213-14, 117 S.Ct. 1174 (quoting *Turner I*, 512 U.S. at 662, 114 S.Ct. 2445).

As to advancing an important governmental interest, the Congress enacted the subscriber limits based upon two stated concerns: that cable operators would impose their own biases upon the information they disseminate, and that a few dominant cable operators might preclude new programming services from attaining the critical mass audience necessary to survive. *See* S. REP. at 32-33. Time Warner does not argue that the Congress failed to identify an important governmental interest, but rather faults the Congress for having acted without having made findings, and without having evidence upon which it could have made findings, that either of these problems is a real one. *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S.Ct. 2329, 2348, 138 L.Ed.2d 874 (1997) (invalidating portion of Communications Decency Act "in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA").

According to Time Warner, cable operators in fact can neither bias the flow of information nor obstruct the expression of unpopular speech because other statutory provisions require them to carry independent programming, including public, educational, and governmental (PEG) programming, and the programming on leased access channels and local broadcast stations. *See* 47 U.S.C. §§ 531, 532, 534 & 535. As for the concern that cable operators might erect barriers to the entry of new programming services, Time Warner argues that the Congress did not establish either that cable operators have attempted to exclude new cable programmers, or that they have an incentive to do so.

The Government responds that the promotion of diversity in ideas and speech, as well as the preservation of competition, are important governmental interests, and that the Congress reasonably viewed increased concentration in the cable industry as a threat to both diversity and competition. The Government acknowledges that the 1992 Cable Act requires cable operators to carry PEG and several other types of local programming, but argues that these requirements were not meant directly to preserve competition, nor do they promote diversity in the sources of cable programming at the national level.

The Senate Report accompanying the 1992 Cable Act noted that concentration of ownership had increased dramatically: By 1990, the five largest cable operators served nearly half the country's cable subscribers. S. REP. at 32. Witnesses testified that as a result of this increase in concentration "the large MSOs [multiple system operators] have the market power to determine what programming services can 'make it' on cable." S. REP. at 33, 1992 U.S.C.C.A.N. at 1167. Based upon this and related evidence, the Congress found that "[t]he potential effects of . . . concentration [in the cable industry] are barriers to entry for new programmers and a reduction in the number of media

voices available to consumers." 47 U.S.C. § 521(a)(4). It also found that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." *Id.* § 521(a)(6). We conclude that the Congress drew reasonable inferences, based upon substantial evidence, that increases in the concentration of cable operators threatened diversity and competition in the cable industry. *See Turner II*, 520 U.S. at 195-96, 117 S.Ct. 1174 (discussing deference due to Congress's findings).

As to burdening more speech than necessary, Time Warner argues that subscriber limits will not increase the diversity of information sources available to the public in any locale. Nor, we are told, are subscriber limits necessary in order to promote competition; the antitrust laws, as well as the antidiscrimination provision of the 1992 Cable Act, *see* 47 U.S.C. § 536(a)(3), provide a sufficient check upon any potentially anticompetitive conduct by cable operators.

Although we cannot say that a national ownership cap will surely increase the diversity of programming available at the local level, neither are we required to do so in order to uphold the statute as constitutional. *See, e.g., United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) ("The validity of [a] regulation[ ] does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests"). It is enough that, having determined that "[c]oncentration has grown dramatically in the cable industry," S. REP. at 32, 1992 U.S.C.C.A.N. at 1165, the Congress reasonably concluded that this concentration threatened the diversity of information available to the public and could form a barrier to the entry of new cable programmers. That is hardly an unreasonable inference. *See Federal Communications Comm'n v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 780, 98 S.Ct. 2096, 56

L.Ed.2d 697 (1978); PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 420a (1995).

Nor is it a fatal flaw that the subscriber limits provision focuses upon behavior already arguably proscribed by other laws. In the subscriber limits provision the Congress took a structural approach to the regulation of cable operators, whereas the antidiscrimination provision of the 1992 Cable Act and the antitrust laws are behavioral prohibitions. As a structural limitation, the subscriber limits provision adds a prophylaxis to the law and avoids the burden of individual proceedings to remedy particular instances of anticompetitive behavior. *Cf. Turner II*, 520 U.S. at 222-23, 117 S.Ct. 1174 (dismissing petitioner's suggestion that antitrust enforcement or an administrative complaint procedure is an adequate alternative to must-carry obligation: "Congress could conclude . . . that the considerable expense and delay inherent in antitrust litigation, and the great disparities in wealth and sophistication between the average independent broadcast station and average cable system operator, would make these remedies inadequate substitutes"). In sum, Time Warner has not demonstrated that the subscriber limits provision is on its face either unnecessary or unnecessarily overburdensome.

B. The Channel Occupancy Provision

1. The Standard of Review

The channel occupancy provision requires the Commission to establish limits upon "the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." 47 U.S.C. § 533(f)(1)(B). Time Warner likens this provision to "a law prohibiting newspapers from devoting more than a fraction of their columns to editorial content of their own." That this restriction is content-based, it argues, is evident from the Senate Report:

> Vertical integration in the cable industry . . . . gives cable operators the incentive and ability to favor their affiliated programming services. For example, the cable operator might give its affiliated programmer a more desirable channel position than another programmer, or even refuse to carry other programmers.
>
> * * * *
>
> [The channel occupancy provision] is designed to increase the diversity of voices available to the public. Some [MSOs] own many programming services. It would be unreasonable for them to occupy a large percentage of channels on a cable system.
>
> The intent of this provision is to place reasonable limits on the number of channels that can be occupied by each MSO's programming services.

S. REP. at 25, 80, 1992 U.S.C.C.A.N. at 1158, 1213.

Time Warner argues that because the Congress expressed concern that cable operators might favor their affiliated programming services the legislature's "stated design was to suppress cable operators' speech," and to advance the speech of nonaffiliated programmers. Again analogizing itself to a newspaper publisher, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 255-56, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), Time Warner argues that a cable operator has a constitutional right to favor its own speech. By interfering with that right in order to alter the mix of programming available on cable, the Congress has impermissibly regulated the content of cable operators' speech.

A cable operator is unlike a newspaper publisher, however, in the one respect crucial to the Congress's reason for enacting the channel occupancy provision: A newspaper publisher does not have the ability to exclude competing publications from its subscribers' homes. The cable

operator's bottleneck monopoly is a physical and economic barrier to such intra-medium competition. The channel occupancy provision responds in kind, without regard to the content of either the cable operator's speech or that of the unaffiliated programmer for which it secures an outlet. *See Turner I*, 512 U.S. at 656, 114 S.Ct. 2445.

Nor does the Congress's wanting to ensure a multiplicity of voices on cable inherently bespeak a preference for or a bias against the content of any speech. That is why, in *Time Warner*, we upheld under intermediate scrutiny the "leased access provision" of the 1992 Cable Act. That provision requires cable operators to set aside a percentage of their channels for commercial use by unaffiliated programmers in order both to bring "the widest possible diversity of information sources" to cable subscribers and "to promote competition in the delivery of diverse sources of video programming." 93 F.3d at 968-69. In that case, we rejected Time Warner's argument that the leased access provision was a content-based restriction, and therefore subject to strict scrutiny, because nothing in the statute favored or disfavored speech on the basis of its content: "The statutory objective . . . [is] framed in terms of the sources of information rather than the substance of the information." *Id.* at 969 (citing *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945)).

Time Warner now argues that whereas the objective of the leased access provision was to promote speech from various sources without regard to content, the channel occupancy provision is meant to limit speech from a particular type of source and therefore necessarily imposes a content-based restriction. Here it refers us to the statement in the Senate Report that cable operators may have "the incentive and ability to favor" their own or an affiliate's speech. S. REP. at 25, 1992 U.S.C.C.A.N. at 1158. In response, the Government explains, and we agree, that the legislative concern was not

with the speech of a particular source but solely with promoting diversity and competition in the cable industry. Like the leased access provision, that is, the focus of the channel occupancy provision is upon the source of speech, not its content. *See Time Warner*, 93 F.3d at 969 (the "qualification [of nonaffiliates] to lease time on [a cable operator's] channels depends not on the content of their speech, but on their lack of affiliation with the operator, a distinguishing characteristic stemming from considerations relating to the structure of cable television").

We recognize, of course, the possibility that a seemingly neutral limitation may have been crafted in such a way as to single out for regulation the speech of some group that the legislature finds objectionable. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 580, 592, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) (noting that result in *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), "may have been attributable in part to the perception on the part of the Court that the State imposed the tax with an intent to penalize a selected group of newspapers"). There is not a shred of evidence, however, that such an illicit consideration underlies the channel occupancy provision, and indeed Time Warner stops well short of claiming otherwise. We are therefore confident that the channel occupancy provision is content-neutral and subject only to intermediate scrutiny.

2. The Merits

In applying intermediate scrutiny, we inquire "not whether Congress, as an objective matter, was correct" that the channel occupancy provision is necessary to increase the diversity of voices available to the public via cable, but rather "whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress." *Turner II*, 520 U.S. at 211, 117 S.Ct. 1174. Time Warner argues that the Congress's reason for enacting the

channel occupancy provision—to prevent cable operators from favoring affiliated programmers and possibly even excluding others—addresses only a speculative harm because the Congress had no evidence that such exclusionary conduct actually had occurred. On the contrary, Time Warner contends, a cable operator has an incentive to contract with unaffiliated programmers to the extent that doing so will increase the attractiveness of the video programming packages it offers to subscribers; this incentive is reinforced by increased competition from DBS and other alternative providers of video programming.

Nothing in these protestations demonstrates that the Congress's legislative conclusion was either unreasonable or unsupported by substantial evidence. *See Turner II*, 520 U.S. at 211, 117 S.Ct. 1174. The findings in the 1992 Cable Act document the Congress's concerns with affiliation between cable operators and cable programmers:

> The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for non-cable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.

47 U.S.C. § 521(a)(5). The Senate Report accompanying the Act discusses the evidence upon which the Congress based these conclusions. Time Warner is of course correct that a cable operator has an incentive to offer an attractive package of programs to consumers, but the company does not deny that a cable operator also has an incentive to favor its affiliated programmers; where the two forces are in conflict, the operator may, as a rational profit-maximizer, compromise

the consumers' interests. Hence, the concern of the Congress is well grounded in the evidence and a bit of economic common sense.

Finally, Time Warner argues that the channel occupancy provision is unnecessary in light of the anti-discrimination provision of the 1992 Cable Act as well as the antitrust laws. As we noted earlier, however, a prophylactic, structural limitation is not rendered unnecessary merely because preexisting statutes impose behavioral norms and *ex post* remedies. *Cf. Turner II*, 520 U.S. at 222-23, 117 S.Ct. 1174.

III. Conclusion

For the foregoing reasons, we conclude that the subscriber limits and channel occupancy provisions do not run afoul of the first amendment. The judgment of the district court is reversed insofar as it held that the subscriber limits provision is unconstitutional, and affirmed insofar as it held that the channel occupancy provision is constitutional.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 92-2292, 92-2494 and 92-2558

DANIELS CABLEVISION, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
Plaintiff,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Defendants.

DISCOVERY COMMUNICATIONS, INC., *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

Sept. 16, 1993

MEMORANDUM AND ORDER

JACKSON, District Judge.

The plaintiffs in these three lawsuits present facial constitutional challenges to eleven provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. 1460, and to two provisions of the Cable Communications Policy Act of 1984, Pub.L. No. 98-549, 98 Stat. 2780 ("the Cable Act" or "Acts"), contending that, for sundry reasons, these provisions infringe upon their First Amendment right to freedom of speech.[1] No other infirmities are alleged in these actions, however, and the Court is therefore not called upon to address other constitutional issues that may lurk elsewhere in this landmark legislation.

The Court holds that section 11(c) of the 1992 Cable Act (insofar as it amends the Communications Act of 1934 to include new section 613(f)(1)(A)), and sections 15 and 25 of the 1992 Cable Act are unconstitutional. It concludes that all of the remaining provisions of the 1992 and 1984 Cable Acts in dispute are facially compatible with the First Amendment.

I.

The 1992 Cable Act subjects the cable television industry to extensive and unprecedented federal regulation. Controversial from the moment the legislation was first proposed, it

---

[1] Specifically, the plaintiffs in *Time Warner Co. v. FCC*, challenge sections 3, 7(b), 7(c), 9, 10(d), 11, 15, 19, 24 and 25 of the 1992 Act (to be codified at, creating, or amending, respectively, 47 U.S.C. §§ 543, 541(a)(4), 541(f), 532, 558, 533, 544(d), 548, 555a, & 335), and sections 611 and 612 of the 1984 Act (codified at 47 U.S.C. §§ 531 & 532 (1988)). The plaintiffs in *Discovery Communications, Inc. v. United States*, Civ. No. 92-2558, join Time Warner's challenge to sections 3 and 9 of the 1992 Cable Act. The plaintiffs in *Daniels Cablevision, Inc. v. United States*, Civ. No. 92-2292, challenge section 6 of the 1992 Cable Act (amending 47 U.S.C. § 325).

was immediately assailed once enacted from several quarters in these and other lawsuits. The plaintiffs here are cable television system owner/operators and programmers. The named defendants are the United States and the Federal Communications Commission ("the FCC" or "the Commission"), the administrative agency charged with its enforcement.[2] The plaintiffs contend that multiple provisions of the 1992 Cable Act (and, in retrospect, others of its ancestor, the 1984 Cable Act), unconstitutionally interfere with their First Amendment right to "speak" as they wish through the cable television systems they own, control or use, to the audiences of their choice.

Two other lawsuits, in which the plaintiffs challenged two particular provisions of the 1992 Act on similar grounds, were filed within days of the three lawsuits now before this Court.[3] All plaintiffs in all five lawsuits challenged sections 4 and 5 of the 1992 Cable Act (creating 47 U.S.C. §§ 534 & 535), the so-called "must-carry" provisions, which require cable operators to carry programming originating with certain over-the-air television broadcasters whose signals coincide with cable operators' service areas, and all five cases were consolidated as related cases. Thereafter, the claims in all cases challenging the constitutionality of the must-carry provisions were severed for hearing, as the statute expressly requires, by a three-judge district court convened in accordance with section 23 of the 1992 Cable Act. *See*

---

[2] During the pendency of this litigation, numerous interested parties have sought to intervene as plaintiffs or defendants. The applications for intervention have been held in abeyance, but all of these applicants, together with several *amicus curiae* applicants, have been granted leave to participate herein as *amici*. All applicants for intervention have been permitted to file motions and memoranda as exhibits to their motions for intervention, and the Court has considered the entire record amassed in this case.

[3] *Turner Broadcasting System, Inc. v. FCC*, Civ. No. 92-2247 and *National Cable Television Assoc., Inc. v. United States*, Civ. No. 92-2495.

Turner Broadcasting System, Inc. v. FCC, 810 F.Supp. 1308 (D.D.C.1992).[4] All of the plaintiffs' claims other than those involving the must-carry provisions are presently before this single-judge district court on the summary judgment motions of each of the plaintiffs; on the cross-motions for summary judgment of the federal defendants; and on the briefs and dispositive motions of the several applicants for intervention and *amici*.

II.

Starting from the premise of the *Must-Carry Opinion*—that the 1992 Cable Act is essentially a regulatory measure of economic rather than ideologic import—much of its reasoning is apposite to a decision with respect to the remainder of the Act. Congress undertook to expand and tighten government's control over that segment of the television market in which the plaintiffs traded, namely the business of delivering video signals to a major portion of the nation's homes. Congress was largely unconcerned with what was being said with those signals. It *was* concerned, however, that the plexuses of wires linking video "speakers" and most of the television receivers across the country remain open to transmit a diverse mix of "voices," not only the messages chosen for delivery by those who owned or controlled the cables.

Several of the provisions of the 1992 Cable Act avowedly inhibit the cable operators and programmers in making full use of the capabilities of their systems to deliver signals to their subscribers. The plaintiffs challenge these provisions largely on the same grounds on which they based their challenge to the must-carry provisions in sections 4 and 5 of

---

[4] The three-judge district court, in a divided decision, upheld sections 4 and 5 of the 1992 Act. *See Turner Broadcasting System, Inc. v. FCC*, 819 F.Supp. 32 (D.D.C.1993) (three-judge court) [hereinafter *Must-Carry Opinion*].

the 1992 Act. *See Must-Carry Opinion, supra* note 4. The Act, in effect, confiscates a portion of those capabilities for use by others. In First Amendment terms—insofar as plaintiffs are deemed to be "speakers," i.e., purveyors of messages rather than of message-bearing electronic impulses—Congress has deprived them of unlimited choice as to the messages they will deliver, to whom they may deliver them, and the "speakers" for whom they will do so. It is for these reasons, as some cases have held in other contexts, that the cable operators argue that the provisions must be strictly scrutinized.

As the *Must-Carry* court observed, however, in its opinion rejecting similar challenges to the must-carry provisions, the crucial inquiry for determining the appropriate level of First Amendment scrutiny is not merely whether governmental regulation results in compelling certain speech, fetters the speaker's discretion in deciding what to say, or favors particular speakers at the expense of others, but is also whether the regulation is, overtly or covertly, content-based; that is, the government is telling the speaker what can or cannot be said. Constraints on speech, even if deriving from an exercise of governmental authority, need be strictly scrutinized only if the government has specified the speaker's message. *See Turner Broadcasting*, 819 F.Supp. at 42. Although the provisions at issue here may impose some limit on the autonomy of cable operators to speak only such speech as they would themselves pronounce, most do so only to serve regulatory goals unrelated to content. Accordingly, these other provisions, too, are constitutional, as was the case with *Must-Carry*, if those goals serve significant governmental interests and do not burden substantially more speech than necessary to serve these interests. *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 2758,

105 L.Ed.2d 661 (1989); *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968).[5]

Mandatory Carriage of Public, Educational, and Governmental ("PEG") Programming and Leased Access Channels; Rate Regulation; Restrictions on Vertically Integrated Programmers.

Section 7(b) of the 1992 Act, in conjunction with section 611 of the 1984 Act, the "PEG programming" provisions, allows local franchising authorities to require that franchise proposals submitted by aspiring cable operators contain assurances that a portion of their channel capacity will be designated for "public, educational, or governmental use." Once the franchise is awarded, the franchising authority may enforce these "PEG" commitments, 47 U.S.C. § 531(c) (1988), and the franchisee is not thereafter permitted to exercise any editorial control over the PEG programming it is obliged to carry. *Id.* § 531(e).

Section 612(b) of the 1984 Act, the "leased access" provisions, obligates cable operators to reserve channel capacity for use by commercial programmers that are unaffiliated with the operator.[6] 47 U.S.C. § 532(b)(1) (1988).

---

[5] In *O'Brien*, the Supreme Court held that a federal statute making destruction of a selective service registration card a criminal offense did not abridge the freedom of speech of an anti-war protester who burned his draft card to express his opposition to military service. *Ward* upheld municipal regulations governing sound amplification at outdoor musical performances in a public park. Both cases thus found legitimate governmental purposes unrelated to what the objecting "speaker" wanted to say—efficient administration of the draft in the former; noise abatement in the latter—sufficient to justify the incidental curtailment of expressive license the legislation worked.

[6] Mid-sized systems (36-54 activated channels) must reserve 10 percent of their uncommitted channels, i.e., channels which are not otherwise required for a designated use or the use of which is not prohibited by law, for such use, 47 U.S.C. § 532(b)(1)(A) (1988); large systems (55-100 activated channels) must dedicate 15 percent of their uncommitted

Again the cable operator is prohibited from exercising editorial control over its lessees' programming, except to the extent that it may consider content in establishing a reasonable price to charge the unaffiliated lessee, *id.* § 532(c), and it may also decline to carry programming that it reasonably believes to be obscene. 1992 Cable Act § 10(a).

Section 19 of the 1992 Act, the "vertical integration" provisions, regulates the conduct of programmers in which a cable system operator has an attributable (i.e., a property) interest ("vertically integrated programmers" or "VPs"). Section 19 directs the FCC to promulgate regulations to "prohibit discrimination [by vertically integrated programmers] . . . in the prices, terms, and conditions of sale or delivery of . . . cable programming . . . between cable systems. . . ." 1992 Cable Act § 19(c)(2)(B). This provision would apply, for example, to a VP offering its product to an affiliated operator upon more favorable terms than to independent operators. Aggrieved cable operators may initiate an adjudicatory proceeding before the Commission, which has authority to impose reasonable prices or conditions of sale and may assess monetary penalties for noncompliance. *Id.* §§ 19(d) and (e). Section 19 also directs the FCC to adopt regulations prohibiting exclusive distribution contracts between VPs and operators.[7] *Id.* § 19(c)(2)(C).

Section 3 of the 1992 Act, the "rate regulation" provisions, requires cable operators to provide all subscribers with a basic service tier containing all section 4 and 5 mandatory carriage broadcast stations; all public, educational or

---

channels, *id.* § 532(b)(1)(B), and very large systems (over 100 activated channels) must dedicate 15 percent of all of their channels to such use, *id.* § 532(b)(1)(C).

[7] The FCC may, however, permit an exclusive distribution contract in any area that was served by cable on October 5, 1992 if the Commission finds such a contract to be in the public interest. 1992 Cable Act § 19(c)(2)(D).

governmental stations which must be carried pursuant to the franchise; and all regular non-satellite broadcast stations regularly transmitted by the operators. The FCC and local franchise authorities are empowered to ensure that the rates charged by cable systems subject to rate regulation[8] for the basic tier are reasonable, and the FCC is directed to establish a regulatory regime to entertain challenges to the reasonableness of rates charged for all other non-premium channels.[9] Section 3 also requires all operators to maintain a uniform rate structure throughout the geographic region in which the operator offers its services. Finally, section 3 prohibits operators from requiring subscribers to purchase any service, other than the basic tier, as a precondition to receiving any other pay-per-view or pay-per-channel service,

---

[8] A cable system is subject to rate regulation only if it is not otherwise subject to "effective competition." Under section 3, effective competition means that

> "(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;
>
> (B) the franchise area is—
>
> (i) served by at least two unaffiliated multi-channel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and
>
> (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multi-channel video programming distributor exceeds 15 percent of the households in the franchise area; or
>
> (C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area."

[9] Section 9 of the Act similarly requires the FCC to set maximum reasonable rates for the amounts an operator may charge leased access programmers for carriage.

and the price structure for such channels must be uniform regardless of the quantity of services ordered by a subscriber.

The operators take issue with each of these provisions arguing, *inter alia*, that they interfere with their ability to design the packages of services that they would like to offer their subscribers. The programmers object to them on the ground that the provisions make it more difficult for operators to carry the products of certain programmers, and in consequence prevent the programmers from reaching their optimum audience.

Specifically, to use First Amendment lexicon, the plaintiffs reiterate that the PEG programming and leased access provisions force operators to engage in "speech" they might not otherwise undertake, and favor the speech of PEG programmers and non-affiliates over that of the operators themselves or other programmers the government deems less worthy. The vertical integration provisions, they say, interfere with their ability to "speak" to whom they like. Restrictions on the programmers' ability to offer special deals and conditions of delivery to certain operators will reduce the operators' incentive to carry them; without the ability to negotiate exclusive contracts or obtain special deals, the operators profess to be unable to create innovative program line-ups to differentiate their products from those of competitors. Finally, the plaintiffs contend that rate regulation burdens the speech of operators directly, and the programmers indirectly, by setting limits on the prices that subscribers can be charged. The Court holds that these provisions all are content-neutral, are thus subject to *O'Brien/Ward* balancing only, and that they withstand that level of scrutiny.

The PEG and leased access provisions were enacted to serve a significant regulatory interest, *viz.*, affording speakers with lesser market appeal access to the nation's most pervasive video distribution technology. H.R.Rep. No. 934,

98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. at 4655, 4667. Enabling a broad range of speakers to reach a television audience that otherwise would never hear them is an appropriate goal and a legitimate exercise of federal legislative power. *See Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540, 1549-50 (7th Cir.1989); *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F.Supp. 383, 412 (S.D.Fla.1991); *cf. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714, 104 S.Ct. 2694, 2708, 81 L.Ed.2d 580 (1984); *United States v. Midwest Video Corp.*, 406 U.S. 649, 668-70, 92 S.Ct. 1860, 1871-72, 32 L.Ed.2d 390 (1972) (plurality opinion); *see Turner Broadcasting*, 819 F.Supp. at 45-46.

The leased access provisions are likewise content-neutral, and they are designed to serve a similar market regulatory function. The provisions promote fair competition by overcoming the natural tendency of cable operators to enhance the profitability of their affiliated programmers. *See* S.Rep. No. 92, 102d Cong., 1st Sess. 29-32 (1991); 1992 U.S.C.C.A.N. 1133; H.R.Rep. No. 934, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. at 4667-73; *see* 47 U.S.C. § 532(a) (1988).

Nor do the PEG and leased access provisions overreach. PEG use is negotiable, and leased access obligations are directly proportional to the number of channels a cable operator has available, never exceeding 15 percent of total capacity. Operators retain discretion over the remainder, and may, of course, utilize them as they wish, for their own programming or for that of affiliated programmers.

The constraints placed upon VPs by section 19 are also content-neutral regulatory measures designed to correct a market to which access was controlled by those who own the technology. Congress discovered an altogether understandable tendency on the part of operators to give preferential treatment to those programmers in which the operator has an

economic interest. 1992 Cable Act § 2(a)(5); S.Rep. No. 92, 102d Cong., 1st Sess. 24-29 (1991); H.R.Rep. No. 628, 102d Cong., 2d Sess. 41 (1992). The vertical integration regulations, based on a speech-neutral programmer characteristic, i.e., the economics of ownership, is entirely unrelated to the content of any program.

The burden is, in fact, relatively minor. The provisions do not prohibit any programmer from dealing with any operator altogether; they merely prohibit discrimination and exclusivity agreements.[10] Programmers remain free to market their services to any operators they choose, and, conversely, operators are free to choose among the products of all programmers. *See Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 655, 101 S.Ct. 2559, 2567, 69 L.Ed.2d 298 (1981).[11]

The rate regulation provisions in section 3 are wholly unrelated to content. They are triggered by the content-neutral threshold determination of whether an operator is subject to effective competition. Rate regulation was designed to reduce anti-competitive operator practices, to combat concentration in the industry, and, simply put, to keep rates affordable to the public, regardless of message. *See* 1992 Cable Act § 2(a); S.Rep. No. 92, 102d Cong., 1st Sess. 4-8 (1991); H.R.Rep. No. 628, 102d Cong., 2d Sess. 30-34 (1992). Moreover, not only is Section 3 operable only in the absence of effective competition, Congress has provided the

---

[10] The FCC does, however, have discretion to permit exclusive contracts in specific cases.

[11] Section 11 of the Act directs the FCC to establish "reasonable limits on the number of channels on a cable system that can be occupied" by vertically integrated programmers. Like the other vertical integration restrictions, the channel occupancy limits appear unrelated to content.

Whether or not the regulations ultimately promulgated by the Commission will pass constitutional muster under *O'Brien/Ward* is, of course, at this point unclear.

FCC with standards to determine whether operator rates are reasonable—all of them of a cost accounting nature—eliminating any incentive on the part of the FCC to make discretionary rate-making judgments on the basis of perceived programming merit.[12]

---

[12] In developing a scheme for determining the reasonableness of rates, the Commission is directed to consider

> "(i) the rates for cable systems, if any, that are subject to effective competition;
>
> (ii) the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier [voluntarily by the operator], and changes in such costs;
>
> (iii) only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;
>
> (iv) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;
>
> (v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;
>
> (vi) an amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and
>
> (vii) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under [this section]."

'III.

Three provisions in the 1992 Cable Act appear clearly unconstitutional, either because they overtly impose content-related burdens on speech, or because they do not serve any identifiable regulatory purpose of significance to justify even the incidental burdens they impose. These provisions are the direct broadcast satellite ("DBS") service obligations; the premium channel notice provisions; and the provisions placing quotas on the number of subscribers allowed per cable operator.

Direct Broadcast Satellite Service Provisions

Section 25 of the 1992 Cable Act directs the FCC to impose mandatory carriage requirements on providers of direct broadcast satellite ("DBS") services. DBS distributors transmit their signals *via* earth-orbiting satellites directly into subscribers' receivers through dish antennas, not over coaxial cable strung along public rights-of-way. As a condition to authorization or renewal of any DBS service license, the DBS provider must allocate four to seven percent of its transmission capacity to "noncommercial programming of an educational nature."

The federal defendants protest at the outset that the plaintiffs presently before the Court do not have standing to challenge section 25 because none of them happen to be DBS service providers. Some of the plaintiffs, however, are programmers who market their wares to DBS distributors, and who have alleged that because of the DBS set-aside for educational programming they will find themselves in competition for fewer channel positions. The asserted injury is traceable to section 25, and it clearly would by remedied by the declaratory relief the plaintiffs seek. Accordingly, the plaintiffs meet the requirements for Article III standing. *See Allen v. Wright*, 468 U.S. 737, 751-52, 104 S.Ct. 3315, 3324-25, 82 L.Ed.2d 556 (1984).

The plaintiffs contend that the DBS educational programming set-aside is content-based.[13] *Cf. Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *see also City of Cincinnati v. Discovery Network, Inc.*, — U.S. —,— - —, 113 S.Ct. 1505, 1516-17, 123 L.Ed.2d 99 (1993). The DBS service provisions accord a preference to speakers whose ostensible mission is to enlighten rather than entertain, and therefore, have implicitly been judged by Congress to be more worthy of an audience. Nevertheless, the Court finds that it need not decide whether a preference for "non-commercial programming of an educational nature" is more content-related than, for example, the "local" broadcasting at issue in *Must-Carry*, because, to the extent it subsumes a content component at all, even under *O'Brien/Ward* scrutiny, the DBS provisions must fail.

There is absolutely no evidence in the record upon which the Court could conclude that regulation of DBS service providers is necessary to serve any significant regulatory or market-balancing interest. There is nothing in the record purporting to demonstrate that educational television is presently in short supply in the homes of DBS subscribers, nor is there a reason to conclude that section 25 was designed (or deemed necessary) by Congress to quell anti-competitive DBS provider practices. In the absence of a record identifying a valid regulatory purpose or some other legitimate government interest to be advanced by conscripting DBS channel space, there is no justification for any First Amendment burdens occasioned by section 25. *Accord Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1457 (D.C.Cir.1985), *cert. denied*, 476 U.S. 1169, 106 S.Ct. 2889, 90 L.Ed.2d 977 (1986).

---

[13] The Act's legislative history makes clear that Congress intended the provisions to enhance the "speech" of public service groups, defined as those serving "educational, instructional, or cultural purposes." S.Rep. No. 92, 102d Cong., 1st Sess. 92 (1991).

Premium Channel Notice Provisions

Section 15 of the 1992 Cable Act requires a cable operator to give notice to its subscribers, at least 30 days in advance, if it proposes to provide a free preview of a "premium channel"—one offering movies rated X, NC-17, or R by the Motion Picture Association of America—to entice those who do not ordinarily receive that channel to buy it. The plaintiff operators, and ENCORE, an intervenor-plaintiff offering pay-per-view movie programming services, contend that this provision is unconstitutional because it is indisputably content-related; because it burdens protected speech as well as suppressing obscenity; and because it does not survive the strict scrutiny to which such legislation must be subjected. The Court agrees.

Section 15 is content-based.[14] The section passes judgment on material on the basis of the ratings the motion picture industry assigns to the movies, which, of course, are determined in turn by the movies' content. Content-based "indecency" restrictions are constitutional only if they are a "carefully tailored" means of accomplishing a "compelling" interest. *Sable Communications v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989).

Section 15 also clearly burdens at least some protected speech.[15] The notice requirements make carriage of free previews less practicable and more costly, and cable

---

[14] Not only does the government concede as much, *see* Federal Defendants' Memorandum at 20, the caption to section 15 makes direct reference to content. 1992 Cable Act § 15 ("Notice to Cable Subscribers on Unsolicited Sexually Explicit Programs.").

[15] Both sides agree that movies rated X, NC-17 or R often contain material that is not obscene as that term was defined by the Supreme Court in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Non-obscene material, even if indecent, is fully protected by the First Amendment. *Sable Communications v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989).

operators are dissuaded from carriage of programmers like ENCORE on their systems.

The federal defendants assert that section 15 is necessary to protect unwilling viewers, especially children, from indecent television messages which, although possibly being a compelling interest, *id.*; *see FCC v. Pacifica*, 438 U.S. 726, 748, 98 S.Ct. 3026, 3040, 57 L.Ed.2d 1073 (1978) (citing *Rowan v. Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970)), section 15 is not, in any sense, "carefully tailored" to accomplish.

Congress has simply incorporated the Motion Picture Association's rating system as the measure of indecency; its failure to define indecency for itself, abdicating that responsibility to a trade association, is sufficient for invalidation of section 15 on overbreadth grounds.[16] The government has not and could not demonstrate that all movies rated R are indecent. *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C.Cir.1988) (citing *City of Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987)). It is simultaneously under-inclusive in failing to address identical uninvited indecency originating from non-cable television sources; the law does not apply to broadcasters that carry uncut R or NC-17 movies. Finally, it is not difficult to envision less onerous alternatives, short of continuous notice for 30 days, which would adequately alert sensitive or impressionable viewers (or their parents) to the forthcoming shock of sexually explicit material likely to offend.

Premium channels offered on cable are not "pervasive" in the *Pacifica* sense, i.e., in that questionable material ambient in the airwaves can be made to appear without warning on a television screen merely by turning on the set or throwing a

---

[16] Moreover, no notice is required for an indecent movie that has not been rated by the Association.

channel selector switch. Like a subscription to a publication with "indecent" material or "900" telephone numbers, someone in the household must take affirmative steps to bring a premium channel into the home. *See Sable*, 492 U.S. at 127-28, 109 S.Ct. at 2837; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73-74, 103 S.Ct. 2875, 2884, 77 L.Ed.2d 469 (1983). The householder must subscribe to it, and thereafter retain it by paying the bill. *Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir.1985). Parents also have the ability to block the reception of certain channels by use of "lock boxes" or similar devices which must be provided by cable operators on request. 47 U.S.C. § 544(d) (1988).

Numerical Limitations on Subscribers

A portion of section 11(c) of the 1992 Act directs the FCC to prescribe rules and regulations "establishing reasonable limits on the number of cable subscribers" a cable operator is authorized to reach through cable systems it owns or in which it has an attributable interest. The government contends that this provision is essential to promote competition in the cable industry; horizontal, no less than vertical, combination and expansion threaten to concentrate cable facilities in a few market-dominant entities. The plaintiffs challenge this provision on the ground that it directly interferes with the operators' ability to "speak" to as large an audience of their choice as possible. The Court holds that this provision is unconstitutional.

In *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), the Supreme Court struck down a sales tax imposed on newspapers with a circulation of more than 20,000 copies per week, holding that, although newspapers may not enjoy immunity from general taxation, a tax calculated to "limit the circulation of information to which the public is entitled" is wholly inconsistent with the First Amendment. *Id.* at 250, 56 S.Ct. at 444. The plaintiffs contend that a numerical limitation on the quantity of

subscribers a cable operator is permitted to enroll is constitutionally indistinguishable from a tax graduated upon the quantity of a newspaper's circulation.

The federal defendants counter that the subscription limitation statute is subject only to *O'Brien/Ward* scrutiny, serving content-neutral purposes as it does, namely, to stem horizontal concentration in the cable industry, as well as to promote diversity of speakers. Even if content-neutral, however, and *O'Brien/Ward* thus supplying the appropriate standard by which the provision is to be judged, there would appear to be no circumstances under which the FCC could adopt constitutionally compatible regulations. Even content-neutral regulations may not burden substantially more speech than necessary, and must leave open ample alternative means of reaching an audience. *See Ward*, 491 U.S. at 802-03, 109 S.Ct. at 2760. Any governmentally ordained quota on the number of subscribers a cable operator may reach leaves the operator with absolutely no intra-medium means of speaking to the remainder of its potential audience. The First Amendment protects the right of every citizen to reach the minds of any willing listeners and, thus, the speaker's opportunity to win their attention. *Heffron*, 452 U.S. at 655, 101 S.Ct. at 2567 (citations omitted).[17]

IV.

Three of the provisions challenged by the plaintiffs fail, so far as this Court can discern, to implicate the First Amendment to any significant extent at all. These are the

---

[17] Section 11(c) of the 1992 Act also directs the FCC to "consider the necessity and appropriateness" of limiting the extent to which operators may create cable programming. The plaintiffs facially challenge this provision as well. Although a regulation directly limiting the ability of operators to "speak" as programmers would surely be constitutionally troubling, whether and how the FCC will act is, at this point, entirely speculative.

provisions abrogating the statutory immunity that private cable operators formerly enjoyed for liability for the transmission of obscenity; the provisions immunizing municipally owned cable operators from civil liability to private competitors for money damages; and the retransmission consent provisions. All of these provisions are compatible with the First Amendment.

Elimination of Immunity for Obscenity Carried on PEG and Leased Access Channels

As previously noted, cable operators may not exercise any editorial control over the PEG or leased access channels they are required to carry. The 1984 Act conferred immunity from state law liability upon cable operators who transmitted obscene material included in the obligatory PEG and leased access programming. 47 U.S.C. § 558 (1988). Section 10(d) of the 1992 Act removes all immunity for carriage of obscenity.

The plaintiffs, and the American Civil Liberties Union as *amicus*, contend that potential liability for obscenity carried on PEG and leased access channels impermissibly burdens speech by creating an unacceptable incentive to operator self-censorship. Without immunity, they argue, operators will be forced to screen their PEG and leased access programming for material that might be deemed obscene, and the more timorous among them will become so apprehensive that they will voluntarily refuse to carry controversial programming that might nevertheless enjoy full constitutional protection.

The danger of self-censorship induced by the ambiguity inherent in the concept of obscenity itself has never been held to mandate a constitutional requirement for general immunity from obscenity laws for anyone. In other words, no speakers—cable operators included—have a constitutional *right* to immunity to relieve them of anxiety about crossing the threshold from the risque to the obscene. Congress'

earlier decision to provide cable operators with immunity was a matter of grace that it has always been free to rescind.

Municipal Affiliation with Operators and Immunity from Damage Liability

Section 7(c) of the 1992 Act permits municipally owned cable enterprises to compete with private operators, and relieves municipally owned systems of franchising requirements. Section 24 of the 1992 Act exempts municipalities from civil damages liability arising out of local regulation of cable services. The plaintiffs contend that section 24 is constitutionally suspect because it raises temptation for public cable operators to censor or punish their private competitors.

Section 7(c), on its own, is innocuous. Legislation authorizing the creation of municipal cable franchises to compete with private operators does not, by itself, violate the First Amendment or raise a free speech issue. *Warner Cable Communications, Inc. v. Niceville*, 911 F.2d 634, 635-40 (11th Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 2839, 115 L.Ed.2d 1007 (1991). The plaintiffs' real quarrel is with section 24's creation of damages immunity.

To sustain this as a facial challenge, however, the plaintiffs must demonstrate that section 24 creates such a likelihood of undetectable censorship that as-applied challenges to specific acts of suspected municipal persecution of private cable operators *as they occur* will be ineffective. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-69, 108 S.Ct. 2138, 2143-50, 100 L.Ed.2d 771 (1988).

Plaintiffs' premise is that immunity for civil damages alone makes censorship virtually inevitable; municipalities will view the absence of damage liability as a license to censor. The argument is suggested by the Supreme Court's disapproval of differential taxation schemes when imposed on the media, because "[t]he press plays a unique role as a check

on government abuse, and a tax limited to the press [or a small segment of the press] raises concerns about censorship of critical information and opinion." *Leathers v. Medlock*, 499 U.S. 439, 445, 111 S.Ct. 1438, 1443, 113 L.Ed.2d 494 (1991) (discussing *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444 (1936); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983); and *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987)).

The Court not only finds the hypothesis conjectural; it also concludes that the continuing availability of declaratory and injunctive relief is sufficient of itself to protect against municipal abuses of power if and when they should occur, and that municipal retaliation on the basis of content will be sufficiently apparent in the circumstances to ensure the effectiveness of "as applied" challenges.

Congress found that claims against municipalities for civil damage liability related to their regulatory activities of the cable industry were posing "a potentially crippling burden" on local governments and their ability to provide vital public services to their citizens. S.Rep. No. 92, 102d Cong., 1st Sess. 48-50 (1991). The legislative history of the 1992 Act makes clear that in delegating franchising authority to local governments in the 1984 Act, Congress never anticipated the extent of their exposure to the liability they now confront. *Id.* Elimination of that exposure is thus designed to preserve the municipal franchising and regulation scheme envisioned by the 1984 Act, a factor having nothing whatsoever to do with the operators' constitutionally vouchsafed right to criticize local authority. The differential taxation line of cases is inapposite.

Retransmission Consent

Section 6 of the 1992 Act directs the FCC to implement regulations prohibiting cable operators from carrying broadcast signals without the consent of the originating broadcaster. In conjunction with the must-carry provisions of section 4 of the 1992 Act, section 6 thus provides broadcasters with the enviable election between demanding mandatory carriage of the programming they cannot sell, and negotiating a price for that which is in demand. Daniels Cablevision, Inc. ("Daniels") perceives the effect of section 6 as a "prior restraint" on cable operators' speech because it places a condition on their carriage of material that the broadcaster itself has placed in the public domain.

Congress has independent constitutional authority, however, to provide creative artists—and broadcasters are arguably such—with copyright protection for their work. U.S. Const. Art. I, § 8, cl. 8; *see United Video, Inc. v. FCC*, 890 F.2d 1173, 1191 (D.C.Cir.1989). Daniels responds that while Congress might have extended copyright protection to broadcasters it has not done so, at least in so many words. Instead, Daniels argues, Congress has passed a separate law ostensibly having to do with telecommunications, never once adverting to its copyright powers.

Similar arguments were dismissed by the D.C. Circuit in *United Video*. Congress clearly could have amended the copyright law to provide infringement remedies for cable retransmission of broadcast material. But it is not constitutionally significant that Congress has done in the Cable Act what it otherwise could have done in the Copyright Act. Whatever title of the United States Code Congress chooses to place its law in, the law is still authorized by Congress' Article I power. *United Video*, 890 F.2d at 1191; *see Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977).

For the foregoing reasons, it is, this 16th day of September, 1993,

ORDERED, that the plaintiffs' motions for summary judgment on the claims other than must-carry are granted in part and denied in part; and it is

FURTHER ORDERED, that the federal defendants' motion for summary judgment on the claims other than must-carry is granted in part and denied in part; and it is

FURTHER ORDERED, that judgment is entered in favor of the plaintiffs insofar as they have challenged as unconstitutional sections 15 and 25 of the 1992 Cable Act and that portion of section 11(c) of the 1992 Cable Act amending the Communications Act of 1934 to include new section 613(f)(1)(A); and it is

FURTHER ORDERED, that the plaintiffs' claims, insofar as they challenge sections 3, 6, 7(b)(4)(B), 7(c), 9, 10(d), 19 and 24 of the 1992 Cable Act, those portions of section 11 of the 1992 Cable Act not declared unconstitutional by this Court, and sections 611 and 612 of the 1984 Act, will be dismissed with prejudice; and it is

FURTHER ORDERED, the Court being of the opinion that controlling questions of law are involved herein as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of this litigation, pursuant to 28 U.S.C. § 1292(b), that all further proceedings herein, including determination and imposition of the relief appropriate in the circumstances, are stayed pending completion of proceedings on any appeal permitted to be taken herefrom on application therefor made within 10 (ten) days; and it is

FURTHER ORDERED, that all other pending motions herein (except motions for intervention which are held in abeyance) are denied as moot.

APPENDIX C

[Filed July 21, 2000]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1999

No. 96-5272

TIME WARNER ENTERTAINMENT CO., L.P.,
Appellee

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellants

BEFORE: GINSBURG, ROGERS and TATEL, *Circuit Judges*

ORDER

Upon consideration of appellant/cross-appellee's petition for rehearing filed July 3, 2000, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK L. LANGER, Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Filed July 21, 2000]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1999

No. 96-5272

TIME WARNER ENTERTAINMENT CO., L.P.,
Appellee

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellants

BEFORE: EDWARDS, *Chief Judge*; SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*

ORDER

Upon consideration of appellant/cross-appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK L. LANGER, Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Garland did not participate in this matter.

APPENDIX D

47 U.S.C. § 533. Ownership restrictions

* * * * *

(f) Enhancement of effective competition

(1) In order to enhance effective competition, the Commission shall, within one year after October 5, 1992, conduct a proceeding—

(A) to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest;

(B) to prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest; and

(C) to consider the necessity and appropriateness of imposing limitations on the degree to which multi-channel video programming distributors may engage in the creation or production of video programming.

(2) In prescribing rules and regulations under paragraph (1), the Commission shall, among other public interest objectives—

(A) ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer;

(B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not

unreasonably restrict the flow of the video programming of such programmers to other video distributors;

(C) take particular account of the market structure, ownership patterns, and other relationships of the cable television industry, including the nature and market power of the local franchise, the joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests;

(D) account for any efficiencies and other benefits that might be gained through increased ownership or control;

(E) make such rules and regulations reflect the dynamic nature of the communications marketplace;

(F) not impose limitations which would bar cable operators from serving previously unserved rural areas; and

(G) not impose limitations which would impair the development of diverse and high quality video programming.

* * * * *

47 U.S.C. § 536. Regulation of carriage agreements

(a) Regulations

Within one year after October 5, 1992, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors. Such regulations shall—

(1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;

(2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;

(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors;

(4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;

(5) provide for appropriate penalties and remedies for violations of this subsection, including carriage; and

(6) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

(b) Definition

As used in this section, the term "video programming vendor" means a person engaged in the production, creation, or wholesale distribution of video programming for sale.

Supreme Court, U.S.
FILED
JAN 19 2001
CLERK

(2)

No. 00-623

In the Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Assistant Attorney General

MARK B. STERN
JACOB M. LEWIS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

CHRISTOPHER J. WRIGHT
General Counsel
Federal Communications Commission
Washington, D.C. 20544

25 P

QUESTION PRESENTED

Whether 47 U.S.C. 533(f)(1)(A), which limits the total number of subscribers that a cable television system operator may serve through cable systems that it owns, and 47 U.S.C. 533(f)(1)(B), which limits the number of channels a cable system may occupy with affiliated programming, violate the First Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Associated Press v. *United States*, 326 U.S. 1 (1945)	10
Burson v. *Freeman*, 504 U.S. 191 (1992)	18
FCC v. *Pacifica Found.*, 438 U.S. 726 (1978)	11
Florida Bar v. *Went For It, Inc.*, 515 U.S. 618 (1995)	18
Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495 (1952)	11
Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975)	11
Time Warner Entertainment Co. v. *FCC*, 93 F.3d 957 (D.C. Cir. 1996)	5
Turner Broad. Sys. v. *FCC*:	
512 U.S. 622 (1994)	*passim*
520 U.S. 180 (1997)	8, 9, 13, 15, 16-17, 19, 20
United States v. *O'Brien*, 391 U.S. 367 (1968)	13

Constitution, statutes and regulations:

U.S. Const. Amend. I	5, 6, 8, 9, 10, 13, 18, 20
Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460	2
§ 2(a), 106 Stat. 1460-1463 (47 U.S.C. 521 note)	3
§ 2(a)(2), 106 Stat. 1460	3
§ 2(a)(3), 106 Stat. 1460	3, 13

Statutes and regulations—Continued: Page

§ 2(a)(4), 106 Stat. 1460 ..... 3, 16
§ 2(a)(5), 106 Stat. 1460-1461 ..... 3, 4, 15, 16
§ 4, 106 Stat. 1471 (47 U.S.C. 534) 9
§ 5, 106 Stat. 1477 (47 U.S.C. 535) 9
§ 11(c)(2), 106 Stat. 1487 (47 U.S.C. 533(f)(1)(A)) 2, 9
§ 11(c)(2), 106 Stat. 1487 (47 U.S.C. 533(f)(1)(B)) 2, 8, 9
§ 12, 106 Stat. 1488 (47 U.S.C. 536(a)(3)) 19
47 C.F.R.: 5
Section 76.503(a) (1998) 5
Section 76.504(a) 5

Miscellaneous:

Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, In re, Seventh Annual Report (Jan. 8, 2001) 12-13
H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) 3, 14, 15, 16
Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits, In re, Third Report and Order, 14 FCC Rcd 19,098 (1999) 5, 14
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, In re, Second Report and Order, 8 FCC Rcd 8565 (1993) 12, 18
S. Rep. No. 92, 102d Cong., 1st Sess. (1991) 3, 14, 15, 16, 17

In the Supreme Court of the United States

No. 00-623

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 211 F.3d 1313. The opinion of the district court (Pet. App. 18a-40a) is reported at 835 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2000. A petition for rehearing was denied on July 21, 2000 (Pet. App. 41a, 42a). The petition for a writ of certiorari was filed on October 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act or Act), significantly restructured federal regulation of the cable television industry. "Among other things," this Court has noted, the Act "subjects the cable industry to rate regulation by the Federal Communications Commission (FCC) and by municipal franchising authorities; prohibits municipalities from awarding exclusive franchises to cable operators; imposes various restrictions on cable programmers that are affiliated with cable operators; and directs the FCC to develop and promulgate regulations imposing minimum technical standards for cable operators." *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 630 (1994) (*Turner I*). At issue in this case are two provisions of the 1992 Cable Act: the "subscriber-limit provision," 47 U.S.C. 533(f)(1)(A), and the "channel-occupancy provision," 47 U.S.C. 533(f)(1)(B).

The subscriber-limit provision requires the FCC "to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest." 47 U.S.C. 533(f)(1)(A). The channel-occupancy provision requires the FCC "to prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." 47 U.S.C. 533(f)(1)(B).

The 1992 Cable Act is the product of "three years of hearings on the structure and operation of the cable television industry." *Turner I*, 512 U.S. at 632; see

S. Rep. No. 92, 102d Cong., 1st Sess. 3-4 (1991) (Senate Report); H.R. Rep. No. 628, 102d Cong., 2d Sess. 74 (1992) (House Report). Congress's conclusions based on those extensive hearings are embodied in legislative findings that are "recited in the text of the Act itself." *Turner I*, 512 U.S. at 632; see 1992 Cable Act § 2(a), 106 Stat. 1460-1463.

Among other things, Congress found that, "[f]or a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems." 1992 Cable Act § 2(a)(2), 106 Stat. 1460. "The result," Congress found, "is undue market power for the cable operator as compared to that of consumers and video programmers." *Ibid.* That market power is a matter of concern, Congress explained, because by the time the 1992 Cable Act was adopted, "the cable television industry ha[d] become a dominant nationwide video medium," with more than "60 percent of the households with televisions" subscribing. § 2(a)(3), 106 Stat. 1460.

Congress also found that the "cable industry has become highly concentrated." 1992 Cable Act § 2(a)(4), 106 Stat. 1460. As Congress explained, "the potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers." *Ibid.* In addition, Congress found, "[t]he cable industry has become vertically integrated; cable operators and cable programmers often have common ownership." § 2(a)(5), 106 Stat. 1460. "As a result," Congress stated, "cable operators have the incentive and ability to favor their affiliated programmers." *Ibid.* Congress ex-

plained that such vertical integration "could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems." § 2(a)(5), 106 Stat. 1460-1461. The 1992 Cable Act's subscriber-limit and channel-occupancy provisions are intended to address Congress's concerns about some of the consequences of increasing horizontal concentration and vertical integration in the cable television industry.

2. Upon the passage of the 1992 Act, petitioner, then and now one of the nation's largest cable operators, filed a facial constitutional challenge to a number of the Act's requirements, including the subscriber-limit and channel-occupancy provisions. On cross-motions for summary judgment, the district court upheld the channel-occupancy provision but struck down the subscriber-limit provision. Pet. App. 28a & n.11, 34a-35a.

The district court upheld the channel-occupancy provision in the course of affirming the constitutionality of several of the 1992 Act's constraints upon vertically-integrated cable programmers. Pet. App. 28a. The court explained that the vertically-integrated programmer provisions are "content-neutral regulatory measures designed to correct a market to which access was controlled by those who own the technology" and address "an altogether understandable tendency on the part of operators to give preferential treatment to those programmers in which the operator has an economic interest." *Id.* at 27a-28a. The court emphasized that, because those statutory constraints are "based on a speech-neutral programmer characteristic, i.e., the economics of ownership," they are "entirely unrelated to the content of any program." *Id.* at 28a. The court concluded that the channel-occupancy restrictions, "[l]ike the other vertical integration re-

strictions[,] * * * appear unrelated to content." *Id.* at 28a n.11.

The district court assumed that the 1992 Cable Act's subscriber-limit provision is likewise content-neutral, and that intermediate First Amendment scrutiny is therefore also applicable to that provision. Pet. App. 35a. The court nonetheless concluded that "there would appear to be no circumstances under which the FCC could adopt constitutionally compatible regulations." *Ibid.* The court stated that "[a]ny governmentally ordained quota on the number of subscribers a cable operator may reach leaves the operator with absolutely no intra-medium means of speaking to the remainder of its potential audience." The court found such a limitation incompatible with the First Amendment's protection of "the right of every citizen to reach the minds of any willing listeners." *Ibid.*

3. The court of appeals reversed the district court in part and upheld the constitutionality of both challenged provisions. Pet. App. 1a-17a.[1]

---

[1] In an intervening appeal, the court of appeals upheld the constitutionality of most of the provisions of the 1992 Cable Act that had been challenged before the district court. *Time Warner Entertainment Co.* v. *FCC*, 93 F.3d 957 (D.C. Cir. 1996). The court "express[ed] no opinion as to the constitutionality" of the subscriber-limit or the channel-occupancy provisions (*id.* at 980), however, because the FCC had in the interim promulgated rules implementing the provisions. See 47 C.F.R. 76.503(a) (1998), amended, *In re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits, Third Report and Order*, 14 FCC Rcd 19,098 (1999) (*Third Horizontal Ownership Limits Report*) (setting subscriber limit at 30% of all multichannel video programming subscribers); 47 C.F.R. 76.504(a) (setting channel-occupancy limit at 40% of activated channels). The court of appeals accordingly chose to consolidate petitioner's constitutional challenge to the

The court concluded that neither the subscriber-limit nor the channel-occupancy provision is a content-based restriction on speech. Pet. App. 8a, 15a. The court explained that Congress enacted the subscriber-limit provision out of concern that cable operators might use their "bottleneck power" over video programming that is transmitted to a subscriber's home "to exclude other providers of cable programming." *Id.* at 7a. The court emphasized, however, that Congress's "concern was not with what a cable operator might say, but that it might not let others say anything at all in the principal medium for reaching much of the public." *Ibid.* Congress "plac[ed] a value upon diversity and competition in cable programming," the court stated; but in doing so "Congress did not necessarily also value one speaker, or one type of speech, over another; it merely expressed its intention that there continue to be multiple speakers." *Ibid.* Likewise, the court concluded that the channel-occupancy provision operates "without regard to the content of either the cable operator's speech or that of the unaffiliated programmer for which it secures an outlet." *Id.* at 14a. The court therefore evaluated both challenged provisions pursuant to an intermediate standard of First Amendment scrutiny, under which a statute will be sustained as long as it advances "important governmental interests unrelated to the suppression of free speech" and "does not burden substantially more speech than necessary to further those

---

1992 Cable Act's subscriber-limit and channel-occupancy provisions with its challenge to the FCC's implementing regulations. Petitioner's challenge to the FCC's implementing regulations was later severed and remains pending before the court of appeals. See Pet. App. 2a-3a; *Time Warner Entertainment Co.* v. *FCC*, No. 94-1035 (D.C. Cir.) (argued Oct. 17, 2000).

interests." *Id.* at 8a (citation omitted); see also *id.* at 15a.

On the merits, the court of appeals upheld the constitutionality of both provisions. The court held that, by addressing the increasing concentration of the cable industry, the subscriber-limit provision advances the government's important interests of preserving "the diversity of information available to the public" and preventing "a barrier to the entry of new cable programmers." Pet. App. 11a. The court rejected petitioner's argument that the subscriber-limit provision was unnecessary because it "focuses upon behavior already arguably proscribed by other laws." *Id.* at 12a. The court observed that the "subscriber limits provision * * * took a structural approach to the regulation of cable operators, whereas the antidiscrimination provision of the 1992 Cable Act and the antitrust laws are behavioral prohibitions." *Ibid.* Such a "structural limitation," the court stated, "adds a prophylaxis to the law and avoids the burden of individual proceedings to remedy particular instances of anticompetitive behavior." *Ibid.*

The court likewise ruled that Congress had a reasonable basis for determining that the channel-occupancy provision would advance important government purposes, by "prevent[ing] cable operators from favoring affiliated programmers and possibly even excluding others." Pet. App. 16a. The court explained that, while "a cable operator has an incentive to offer an attractive package of programs to consumers," it "also has an incentive to favor its affiliated programmers; where the two forces are in conflict, the operator may, as a rational profit-maximizer, compromise the consumers' interests." *Id.* at 16a-17a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. The 1992 Cable Act directs the FCC to establish "reasonable" limits on the number of subscribers that an operator can reach through systems that it owns, 47 U.S.C. 533(f)(1)(A), and "reasonable" limits on the number of channels on a cable system that can be occupied by programming that is affiliated with the cable operator, 47 U.S.C. 533(f)(1)(B). To prevail on its facial constitutional challenge to those provisions, petitioner must show that no implementing regulations adopted by the FCC, no matter how generous to the cable operator, could be consistent with the First Amendment. Petitioner has failed to satisfy that heavy burden.

Petitioner's principal contention (Pet. 10-22) is that the subscriber-limit and channel-occupancy provisions are subject to strict scrutiny rather than intermediate First Amendment scrutiny. That contention cannot be squared with this Court's decisions in *Turner I*, *supra*, and *Turner Broadcasting System* v. *FCC*, 520 U.S. 180 (1997) (*Turner II*). As this Court made clear in *Turner I*, strict scrutiny under the First Amendment is reserved for laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content." 512 U.S. at 642. In contrast, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Ibid.* (citation omitted).

The application of the Act's subscriber-limit provision depends on "the number of cable subscribers" that a cable operator "is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest." 47 U.S.C. 533(f)(1)(A). The channel-occupancy provision applies to cable operators only insofar as they have an "attributable interest" in a cable programmer. 47 U.S.C. 533(f)(1)(B). Neither provision refers to, or makes its application dependent in the slightest upon, the content of the programming to be distributed by the operator. Accordingly, the court of appeals correctly concluded that both provisions are content-neutral and subject only to intermediate First Amendment scrutiny. Pet. App. 8a, 15a.

Petitioner contends that, irrespective of content-neutrality, the subscriber-limit and channel-occupancy provisions are subject to strict First Amendment scrutiny because they impose "direct" restraints on speech that "necessarily reduce[] the quantity of expression." Pet. 11, 16 (citation omitted). But the restraints imposed by the subscriber-limit and channel-occupancy provisions of the 1992 Cable Act are no more "direct" than are those imposed by the "must-carry" provisions of the same statute, which require cable operators to set aside up to a third of their channel capacity to carry the signals of commercial broadcast stations and non-commercial educational stations requesting such carriage. 47 U.S.C. 534, 535. This Court applied intermediate scrutiny to those must-carry provisions in *Turner I*, 512 U.S. at 662, and *Turner II*, 520 U.S. at 189.

Moreover, contrary to petitioner's contention (Pet. 11), the provisions at issue in this case are not intended to and do not restrict the overall quantity of expression.

To the contrary, by preventing cable operators from exercising bottleneck monopoly power, the provisions ensure that cable operators do not prevent unaffiliated cable programmers, who have their own First Amendment expressive rights, from reaching their intended audience. As this Court stated in *Turner I*, "[t]he First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." 512 U.S. at 657.

Petitioner also contends (Pet. 14) that imposing restrictions on expression in order to promote a diversity of speech is inherently content-based. That submission is plainly incorrect. As the court of appeals observed, "[b]y placing a value upon diversity and competition in cable programming the Congress did not necessarily also value one speaker, or one type of speech, over another; it merely expressed its intention that there continue to be multiple speakers." Pet. App. 7a. Indeed, as this Court has repeatedly recognized, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner I*, 512 U.S. at 663; see also *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945) (First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

Nor does the court of appeals' decision create an exception to First Amendment principles for the cable medium, as petitioner contends (Pet. 16). Under long-standing First Amendment principles, courts take

account of the special aspects of each medium of communication in evaluating restrictions on expression. See, *e.g.*, *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748 (1978); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952). The "unique physical characteristics of cable transmission * * * do not require the alteration of settled principles of our First Amendment jurisprudence," but neither should they "be ignored when determining the constitutionality of regulations affecting cable speech." *Turner I*, 512 U.S. at 639. Here, as this Court also emphasized in upholding the constitutionality of the 1992 Cable Act's "must carry" provisions, "the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home." *Id.* at 656. As a result, "simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude." *Ibid.* In short, "[a] cable operator, unlike speakers in other media, can * * * silence the voice of competing speakers with a mere flick of the switch." *Ibid.*[2]

---

[2] For this reason, petitioner's attempt to analogize the subscriber-limit and channel-occupancy provisions to restrictions on the operations of newspapers (Pet. 2) is entirely misplaced. As this Court explained in *Turner I*, unlike a cable operator, "[a] daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications—whether they be weekly local newspapers, or daily newspapers published in other cities. Thus, when a newspaper asserts exclusive control over its own news copy, it does not

Petitioner suggests (Pet. 20) that the court of appeals' reliance on the cable medium's bottleneck power is undermined by recent developments in the marketplace, such as "the emergence of the Internet and the contemporary ability of broadcast television, broadband telephone networks, and direct broadcast satellites to deliver video programming to the public." Congress is the appropriate body to determine whether competition in the overall delivery of video programming has advanced to the point where the structural provisions of the 1992 Cable Act are no longer necessary. In addition, the FCC can take account of developments in the video programming market to adjust the rules that Congress has directed it to promulgate, and for that reason it has committed to reviewing its subscriber-limit rules every five years. See *In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Second Report and Order*, 8 FCC Rcd 8565, 8583 (1993).

In any event, petitioner itself emphasizes (Pet. 1) that cable television remains "a vast electronic medium that is responsible for bringing Americans much of their news, information, and entertainment." While alternative methods of distribution of multichannel video programming have grown in significance, the latest available figures (as of June 2000) show that 80% of all subscribers to multichannel video programming distributors "received their video programming from a franchised cable operator." *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual*

---

thereby prevent other newspapers from being distributed to willing recipients in the same locale." 512 U.S. at 656.

Report ¶ 5 (Jan. 8, 2001) (*Seventh Competition Report*).[3] Thus, cable television remains, now as in 1992, "a dominant nationwide video medium." 1992 Cable Act § 2(a)(3), 106 Stat. 1460.[4]

2. Under intermediate First Amendment scrutiny, "[a] content-neutral regulation will be sustained * * * if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189; *Turner I*, 512 U.S. at 662; *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). In this case, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner I*, 512 U.S. at 663. Likewise, "the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." *Id.* at 664. By addressing the concerns raised by horizontal concentration and vertical integration in the cable industry, the subscriber-limit and channel-occupancy provisions of the 1992 Cable Act advance

---

[3] We have lodged a copy of the *Seventh Competition Report* with the Clerk.

[4] Contrary to petitioner's suggestion (Pet. 18 n.5), there is no reason to hold the petition in this case for the Court's decisions in *United States* v. *Vopper*, No. 99-1728, and *Bartnicki* v. *Vopper*, No. 99-1687 (argued Dec. 5, 2000), or for *FEC* v. *Colorado Republican Federal Campaign Committee*, No. 00-191 (to be argued Feb. 28, 2001). Neither of those cases has anything to do with the cable industry or with the constitutionality of regulations designed to preserve a diversity of voices or to regulate fair competition in a media industry.

these important governmental interests without unnecessarily burdening expressive activity.

It was entirely reasonable for Congress to conclude that the cable industry's increasing market concentration "threatened the diversity of information available to the public and could form a barrier to the entry of new cable programmers." Pet. App. 11a. By definition, increasing concentration in a media industry marks a corresponding reduction in the number of media voices available to consumers. See Senate Report 32-33. Moreover, there was evidence before Congress that programmers seeking to establish a successful cable channel are likely to be forced to deal with a dominant cable operator only on unfavorable terms and conditions, unless sufficient competitive programming outlets remain. See *id.* at 33. Thus, the House Report pointed to evidence indicating that "the size of certain [cable operators] could enable them to extract concessions from programmers, including equity positions, in exchange for carriage," thereby "discourag[ing] entry of new programming services, restrict[ing] competition, [and] impact[ing] adversely on diversity." House Report 42-43.[5] The subscriber-limit provision embodies Congress's effort to ensure that cable operators do not

---

[5] To achieve long-term viability, a newly-established cable programming service must achieve a certain level of subscribership, a level the FCC has most recently estimated at 15 million subscribers, or roughly 20% of the market. *Third Horizontal Ownership Limits Report*, 14 FCC Rcd at 19,115-19,116; see also *id.* at 19,117-19,118 (estimating that a new channel has a 50% chance of obtaining subscribers that are not actively denied to it). If a few companies own most of the cable systems in the country, a new programming service will not be able to succeed in the cable marketplace without acceding to the terms and conditions imposed by large operators with dominant systems of distribution.

dominate the national market for video programming to the detriment of diversity and fair competition.

Likewise, vertical integration gives "cable operators * * * the incentive and ability to favor their affiliated programmers," and "could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems." Pet. App. 16a (quoting 1992 Cable Act § 2(a)(5), 106 Stat. 1460-1461). Congress was concerned that when a vertically integrated cable operator is confronted with a choice between purchasing the programming of a service with which the operator is affiliated, or purchasing the programming of a service with which the operator has no ownership relation, the operator will give preference to the affiliated programmer, since the operator has a financial stake in the programmer's operations. See Senate Report 25-26; House Report 41. The channel-occupancy provision seeks to ensure that each cable system preserves sufficient outlets for unaffiliated programming, thereby furthering the governmental interests in media diversity and fair competition at the local level.

Petitioner contends (Pet. 24) that the court of appeals' analysis of the statute rested on "unadorned speculation." That submission is without merit. In evaluating the subscriber-limit provision, the court of appeals specifically noted the evidence that horizontal concentration in the cable industry "had increased dramatically," and that, "[b]y 1990, the five largest cable operators served nearly half the country's cable subscribers." Pet. App. 10a (citing Senate Report 32); see also *Turner II*, 520 U.S. at 197-198 (opinion of Kennedy, J.) (reciting evidence of horizontal concentration). Such increasing concentration necessarily resulted in a "reduction in the number of media voices available to consumers" of video programming, as

Congress recognized. 1992 Cable Act § 2(a)(4), 106 Stat. 1460. As the court of appeals noted (Pet. App. 10a), Congress also had before it evidence that such concentration resulted in large cable operators having the power to "determine what programming services can 'make it' on cable," and to "force programmers to buy their way onto cable by giving up an equity interest in their programming." See Senate Report 33.

The increasing vertical integration at the time of the passage of the 1992 Cable Act is also indisputable. Congress noted that, of the "68 nationally delivered cable video networks, 39 * * *, or 57 percent, have some ownership affiliation with the operating side of the cable industry." House Report 41; see also Senate Report 25 (noting that Viacom, which owns Viacom Cable Systems, "owns programming services such as MTV, Showtime, and Nickelodeon," and TCI, then the largest cable multisystem operator, "ha[d] financial interests in programming services such as American Movie Classics, the Discovery Channel, QVC Networks, Inc., and Encore"); *Turner II*, 520 U.S. at 198 (opinion of Kennedy, J.). Because of the frequent common ownership between cable operators and cable programmers, Congress found, "cable operators have the incentive and ability to favor their affiliated programmers," which "could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems." 1992 Cable Act § 2(a)(5), 106 Stat. 1460-1461; see House Report 41.[6]

---

[6] Petitioner asserts that Congress's findings should be discounted because the testimony in the legislative record was "self-interested." Pet. 23. In doing so, petitioner "displays a lack of regard for Congress' factfinding function." *Turner II*, 520 U.S. at 199 (opinion of Kennedy, J.). "It is the nature of the legislative process to consider the submissions of the parties most affected by

Petitioner also contends (Pet. 23) that there is no evidence that cable operators have actually refused to carry unaffiliated programming services solely on anticompetitive grounds. But as one witness before Congress noted,

> You don't need a Ph.D in Economics to figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the *advantage* of the program services in which he has an equity investment and/or in which he is selling advertising availabilities, and to the *disadvantage* of those services * * * in which he does *not* have an equity position.

Senate Report 26. See generally *Turner II*, 520 U.S. at 196-199 (opinion of Kennedy, J.) (summarizing the legislative record). Congress was also entitled to act against the demonstrated potential for harm, without waiting for the damage to important governmental interests to occur. See *Turner I*, 512 U.S. at 671-672 (Stevens, J., concurring in part and concurring in the judgment) ("[E]ven if Congress had had before it no historical evidence that terminations or refusals of carriage had already occurred, it could reasonably infer that cable operators' bottleneck control, together with the already high degree of vertical integration in the industry, would motivate such conduct in the near future.") (footnotes omitted).[7]

---

legislation"; indeed, cable operators also "sent representatives before Congress to try to persuade them of their side of the debate." *Ibid.*

[7] Petitioner derides (Pet. 24-26) the court of appeals' reference to "economic common sense" (Pet. App. 17a) in upholding Congress's judgment in this case. Contrary to petitioner's suggestion, the First Amendment does not require judges to check their

Finally, petitioner complains that the court of appeals did not base its decision on current market statistics. Pet. 25. But current figures do nothing to undermine the court of appeals' analysis. Horizontal concentration and vertical integration in the cable industry remain high. As the most recent (June 2000) figures show, "[t]he ten largest [cable] operators now serve close to 90 percent of all U.S. cable subscribers." *Seventh Competition Report* ¶ 15. And while the percentage of national programming networks affiliated with a cable operator has declined somewhat since the passage of the 1992 Cable Act, see *id.* ¶ 173 (noting that in 2000, cable operators were vertically integrated with 99 of 281, or 35%, of satellite-delivered national programming networks), "nine of the top 20 video programming networks ranked by subscribership are vertically integrated with a cable [operator]," and "11 out of the top 20 video programming networks ranked by prime time ratings are vertically integrated with [a cable operator]." *Id.* ¶ 175.

In any event, as the court of appeals properly recognized (Pet. App. 9a, 15a), judgments about the wisdom or efficacy of provisions such as those at issue in this case are not matters for *de novo* review in the courts. "Even in the realm of First Amendment questions

---

common sense at the courthouse door. Thus, prior decisions of this Court have upheld speech restrictions against First Amendment challenge based in whole or in part on "simple common sense." See, *e.g.*, *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995); *Burson* v. *Freeman*, 504 U.S. 191, 211 (1992). Petitioner's focus on that aspect of the court of appeals' analysis is in any event exaggerated, as the court's reference to common sense was made only in conjunction with its conclusion that the validity of the challenged statutory provisions was "well grounded in the evidence." Pet. App. 17a.

where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Turner II*, 520 U.S. at 196. Nor is "Congress * * * obligated * * * to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner I*, 512 U.S. at 666 (opinion of Kennedy, J.). It is enough that, as here, Congress's action is "grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." *Turner II*, 520 U.S. at 224.

Petitioner also suggests (Pet. 27) that the subscriber-limit and channel-occupancy provisions are invalid because the harms they address are also reached by the antitrust laws, as well as the statute's prohibition against unreasonable discrimination by cable operators against unaffiliated programmers. See 47 U.S.C. 536(a)(3). But, as the court of appeals recognized (Pet. App. 12a), "the antidiscrimination provision of the 1992 Cable Act and the antitrust laws are behavioral prohibitions," which require proof of particular conduct for their enforcement. By contrast, the subscriber-limit and channel-occupancy provisions are structural limitations, which "add[] a prophylaxis to the law and avoid[] the burden of individual proceedings to remedy particular instances of anticompetitive behavior." Moreover, contrary to petitioner's contention (Pet. 26-29), although prophylactic rules in the regulation of media entities must be reviewed with care, they are not *per se* invalid. Thus, in *Turner II*, this Court rejected the suggestion that antitrust enforcement or an administrative complaint procedure would be an adequate

substitute for the 1992 Cable Act's equally prophylactic must-carry provisions. As this Court stated in that case, "Congress could conclude * * * that the considerable expense and delay inherent in antitrust litigation, and the great disparities in wealth and sophistication between the average independent broadcast station and average cable system operator, would make these remedies inadequate substitutes." 520 U.S. at 222-223.

Finally, petitioner objects that the subscriber-limit and channel-occupancy provisions are regulatory "overkill." Pet. 27. In doing so, petitioner simply takes issue with Congress's determination as to the level of protection necessary to advance its interests in competition and media diversity. It is settled, however, that a statute subject to intermediate scrutiny under the First Amendment is not infirm simply because a party puts forth a "[dis]agreement with the responsible decisionmaker concerning . . . the degree to which [the Government's] interests should be promoted." *Turner II*, 520 U.S. at 219 (citations and internal quotation marks omitted; brackets and ellipses in original).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Assistant Attorney General

MARK B. STERN
JACOB M. LEWIS
Attorneys

CHRISTOPHER J. WRIGHT
General Counsel
Federal Communications Commission

JANUARY 2001

(3)

Supreme Court, U.S.
FILED
JAN 30 2001
CLERK

No. 00-623

IN THE
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7945

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

ROBERT D. JOFFE
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000

January 30, 2001

13PP

AMENDED CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states the following. Time Warner Entertainment Company, L.P., is a Delaware limited partnership. The general partners in Time Warner Entertainment Company, L.P., each are directly or indirectly wholly owned by AOL Time Warner Inc., a publicly held company. An ownership interest of more than 10 percent in Time Warner Entertainment Company, L.P., is held (directly or indirectly) by AT&T Corp., a publicly held company.

TABLE OF CONTENTS

Page

AMENDED CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) 7

City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988) 8

Edenfield v. Fane, 507 U.S. 761 (1993) 4, 6

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 4, 6, 7

Ibanez v. Florida Dep't of Bus. & Prof'l Reg., 512 U.S. 136 (1994) 4

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 4

Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935) 5

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) 7

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 7

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) . . . 4

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) . 6

Turner Broadcasting System, Inc. v. FCC:

512 U.S. 622 (1994) 2, 3, 4

520 U.S. 180 (1997) 7

United States v. Salerno, 481 U.S. 739 (1987) 7

CONSTITUTION AND STATUTES

U.S. Const. Amend. I . . . . . *passim*

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460:

47 U.S.C. § 533(f)(1)(A) 1

47 U.S.C. § 533(f)(1)(B) 1

47 U.S.C. § 536(a)(3) 5

LEGISLATIVE MATERIALS

H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) . . . 5, 6

S. Rep. No. 92, 102d Cong., 1st Sess. (1991) 3, 6

IN THE

Supreme Court of the United States

No. 00-623

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

The Government's Brief in Opposition only confirms the need for certiorari in this case.

1. The Government does not deny that the subscriber-limits provision (47 U.S.C. § 533(f)(1)(A)) and the channel-occupancy provision (*id.* § 533(f)(1)(B)) constitute direct suppressions of speech. Nor does the Government deny that Congress suppressed the speech of cable operators in order to promote what it believed would be a better, more "diverse," mix of programming. The Government also does not deny that these measures would therefore trigger strict scrutiny (either as direct abridgments of speech or as content-based prohibitions on speech, or both) if they were made applicable to print media. Thus, the Government effectively concedes

that this case presents the question whether settled First Amendment principles are inapplicable in the cable medium.

On the merits of that question, the Government contends that cable speech should be subject to special First Amendment rules because "[a] cable operator, unlike speakers in other media, can . . . silence the voice of competing speakers with a mere flick of the switch." Br. in Opp. 11 (internal quotation marks omitted). But there is no "cable exception" to the First Amendment. This Court's decision in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), on which the Government relies, in fact *rejected* the proposition that regulation of cable was automatically subject to no more than intermediate First Amendment scrutiny. *Id.* at 637-40.

Although *Turner I* upheld must-carry laws, it did not involve content-based "must-not-carry" laws like the subscriber-limits and channel-occupancy provisions. Whereas the restrictions in *Turner I* burdened cable operators' speech only indirectly (by requiring carriage of broadcast stations, many of which would have been carried in any event), the restrictions here at issue directly cap the quantum of speech that a cable operator may utter. And whereas the purpose of the restrictions in *Turner I* was merely to secure a supply of programming for television viewers without cable (by safeguarding the commercial viability of free over-the-air broadcasting), the purpose of the restrictions challenged here is to "improve" upon the mix of speech available within the cable medium. This Court took great pains in *Turner I* to stress that the must-carry rules had neither a direct impact on cable operators' speech nor a content-based purpose, either of which alone would have been sufficient to trigger strict scrutiny. *See* Pet. 16-19. Thus, the Government is simply mistaken in reading *Turner I* as justifying any regulation of cable speech at all, no matter how direct or content-based.

Turner I confirms — it does not reject — the basic notion that a burden on speech triggers strict scrutiny if it either is a direct restriction or has a content-based purpose. Both conditions are met here.

The single paragraph in the Government's brief addressing Congress's diversity-enhancement purpose (Br. in Opp. 10) does not even engage our argument. Of course the Government may seek to increase speech diversity — say, by subsidizing speakers that it deems particularly worthy. But this Court has never permitted the Government to *suppress* speech in the name of increasing diversity. *See* Pet. 13-15. Here, Congress acted out of "concern" that cable operators "will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both." S. Rep. No. 92, 102d Cong., 1st Sess. 32 (1991) ("S. Rep."). As the court of appeals found, Congress suppressed cable operator speech because it feared "that cable operators would impose their own biases upon the information they disseminate." Pet. App. 9a. The First Amendment withdraws from the Government the power to ban speech in order to fine-tune the mix of expression according to the Government's liking and to prohibit speakers from speaking according to their own biases. It is nothing short of startling to find that the Government nevertheless contends that such a power exists in the cable medium.

The Government's claim that *Turner I* somehow authorized the suppression of cable speech in order to promote "diversity" (Br. in Opp. 10) has no basis whatsoever. To the contrary, this Court there warned that any law "designed to ensure that the . . . speech of [some] not drown out the speech of others" would necessarily be "concerned with the communicative impact of the regulated speech" and would therefore trigger strict scrutiny. 512 U.S. at 658; *see* Pet. 19.

2. The Government reads *Turner I* as permanently imposing a maximum ceiling of intermediate scrutiny in the cable medium until Congress or the FCC chooses to revisit the issue. Br. in Opp. 12. According to the Government, the legislature or the agency, not the judiciary, "is the appropriate body" to determine whether post-1992 marketplace changes and technological developments, such as the emergence of the Internet and direct broadcast satellites, alter the constitutional analysis. *Id.*

Quite apart from the Government's misreading of *Turner I*, it is fundamental that the courts, not the political branches, bear ultimate responsibility for determining whether statutory enactments comport with the Constitution. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *see also Turner I*, 512 U.S. at 666 (plurality). Thus, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505-06 (1996) (plurality), this Court rejected the expert views of a state liquor control agency; in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487-90 (1995), the Court rejected the views of the U.S. Bureau of Alcohol, Tobacco and Firearms; and in *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136, 142-44 (1994), and *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993), the Court rejected the views of expert state accountancy boards.

Moreover, the very fluidity and dynamism of the cable medium militate strongly against the Government's view that *Turner I* meant to settle for all time whether and how special physical or economic characteristics of cable affect the application of strict First Amendment scrutiny. This Court should grant review to reaffirm the principle that a statute's constitutionality must be judicially assessed in light of current circumstances, for "[a] statute valid when enacted may

become invalid by change in the conditions to which it is applied." *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935).

3. Certiorari is also needed to clarify and reaffirm basic principles of intermediate scrutiny. The Government cannot identify any real-world evidence that the subscriber-limits and channel-occupancy provisions are in fact needed. That is, the Government cannot show that large cable operators have actually refused to carry unaffiliated new programming services -- let alone that cable operators have done so to such a degree as to justify serious restrictions on their speech. Instead, the Government relies solely on speculation that such risks might exist because of vertical integration or horizontal concentration in cable markets -- despite the more narrowly tailored remedies already provided by the antitrust laws and the 1992 Cable Act's anti-discrimination provision. 47 U.S.C. § 536(a)(3).

Such conjecture cannot justify a prophylactic ban on speech, as is borne out by the very "evidence" on which the Government relies. For example, the Government points to a statement in the House report that "'the size of certain [cable operators] *could* enable them to extract concessions from programmers.'" Br. in Opp. 14 (quoting H.R. Rep. No. 628, 102d Cong., 2d Sess. 42-43 (1992) ("H.R. Rep.")) (emphasis added). Not only is the statement wholly speculative, but the Government fails to mention that the same House report emphasizes, only two sentences later, that vertical integration has pro-competitive benefits and can stimulate new programming services:

> [P]ermitting system operators an equity position in programming services may be *an efficient way of financing new service providers* and compensating cable operators for assuming some of the risk associated with the launch of a new service.

> The Committee also is aware that consolidation in the cable industry has brought some *benefits to consumers*. The Committee believes that the growth of [cable operators] in the cable industry has produced some efficiencies in administration, distribution, and procurement of programming. Further, programmers' transaction costs also may have been reduced in the absence of the need for negotiation with each of thousands of local cable systems throughout the country. Moreover, large [cable operators], able to take risks that a small operator would not, can provide a sufficient number of subscribers to *encourage new programming entry*.

H.R. Rep. at 43 (emphases added). The Senate report cited by the Government similarly recognizes that "there are legitimate reasons for integration" and that there are "efficiencies associated with the increased size of cable companies." S. Rep. at 33-34.

Such ambiguous evidence hardly provides sufficient support for the Government's speculation that the subscriber-limits and channel-occupancy provisions are narrowly tailored means of addressing an actual governmental interest. *Edenfield*, 507 U.S. at 768. The proper test under the First Amendment is not whether a government interest is imaginable. The Government's burden cannot be satisfied by mere "speculation or conjecture." *44 Liquormart*, 517 U.S. at 507 (plurality opinion) (internal quotation marks omitted). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Edenfield*, 507 U.S. at 777 (internal quotation marks omitted). For example, this Court has held that a blanket ban on solicitation letters is invalid where individual letters can be reviewed on a case-by-case basis. *Shapero v. Kentucky Bar*

Ass'n, 486 U.S. 466, 478 (1988). A ban on liquor advertising is invalid where "educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective." *44 Liquormart*, 517 U.S. at 507 (plurality opinion).

Nor can the Government derive support from *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"). There, this Court rejected the suggestion that the antitrust laws or an administrative-complaint mechanism would constitute a less restrictive yet equally effective alternative to must-carry. *Id.* at 222-23. But the Court reached that conclusion only after a remand and on the basis of a vast evidentiary record. *Id.* at 223. Nothing remotely comparable exists here.

4. The Government contends that the facial nature of petitioner's challenge carries a special burden. Br. in Opp. 8. But, because the subscriber-limits and channel-occupancy provisions are direct, content-based restrictions on the quantity of cable operator speech and cannot pass muster under any level of First Amendment scrutiny, there is "no set of circumstances . . . under which [they] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The statutory provisions would be facially invalid even if it were possible to conceive of governmental interests that could be served by a properly drawn replacement law.* If anything,

---

* *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 392, 396 (1992) (content-based hate-crimes law was facially void even though a properly drawn statute would have been able to punish the cross burning at issue); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988) (plaintiff may prevail in facial attack if she shows that "every application of the statute create[s] an impermissible risk of suppression of ideas") (internal quotation marks omitted); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (rule purporting to ban all "First Amendment activities" in the central terminal at Los Angeles

any administrative latitude on the part of the FCC in the implementation of the statute constitutes a separate constitutional defect. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988) ("the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7945

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

ROBERT D. JOFFE
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000

January 30, 2001

International Airport was facially void even though *some* speech within its ambit could permissibly have been regulated by a narrower law).